FILED
FEB 7 1928
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

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# No. 433

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CITY OF GAINESVILLE, PETITIONER,

*v.*

BROWN-CRUMMER INVESTMENT COMPANY, SOUTHERN SURETY COMPANY, AND H. O. HEAD, EXECUTOR.

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## BRIEF FOR PETITIONER.

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(32,885)

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BROWN-CRUMMER INVESTMENT COMPANY, SOUTHERN SURETY COMPANY, AND H. O. HEAD, EXECUTOR, RESPONDENTS.

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## BRIEF FOR PETITIONER.

---

### Grounds of Jurisdiction.

This suit was brought in the District Court for Cooke County, Texas, on October 11, 1921, by the City of Gainesville (a Texas municipal corporation), hereafter called the city, against the Southern Construction Company (a partnership composed of Lester Levy and Harry D. Levy, citizens of Texas), hereafter called the Construction Co.; the Southern Surety

Company (an Iowa Corporation) hereafter called the Surety Co., and H. W. Head, a citizen of Texas, residing in Grayson County, to recover exceeding $15,000 (R., 119). Default judgment was rendered by said court in favor of the plaintiff against all defendants for $15,000 and against the Construction Co. for $4,090, which judgment upon appeal by Head and the Surety Co. was reversed by the Court of Civil Appeals for the Sixth District as to Head and the Surety Co. but affirmed as to the Construction Co. (See Head *vs.* City of Gainesville, 258 S. W., 323.) Upon the remand of the suit to the District Court of Cooke County, H. O. Head as executor made himself a party in lieu of H. W. Head, who had died, and he and the Surety Co. filed an answer to the petition alleging the invalidity of the warrants. Thereupon the city amended its petition making the Brown-Crummer Investment Company (a Kansas corporation), hereafter called the Investment Co., a party defendant, and the Investment Co. within the time allowed by law filed its petition to remove the cause to the District Court of the United States for the Eastern District of Texas upon the ground of a separable controversy. After a transcript of the proceedings was filed in said court, a motion to remand, timely made by the city, was overruled. All parties recast their pleadings in the United States District Court with exception of the Construction Co., which did not appear. The Investment Co. by cross-answer sought to recover judgment against the city for exceeding $12,000 (R., 119). The case was tried in said court on the 25th day of May,

1926 (R., 123). The court directed the jury to return a verdict in favor of the Investment Co., against the city, for $13,125 with interest at the rate of 6 per cent per annum from rendition, and that the city take nothing as to H. O. Head, executor of H. W. Head, deceased, and the Surety Co. upon the causes of action asserted by the city against them. A verdict was returned and judgment entered in accordance with the instructions of the court (R., 225 and 123). The city carried the case by writ of error to the United States Circuit Court of Appeals for the Fifth Circuit, which on the 6th day of July, 1927, affirmed the judgment of the lower court (R., 294) in favor of the Investment Co. against the city, but the court being of the opinion that it was without jurisdiction of the controversy between the city and the other defendants, remanded the case as to them with directions to dismiss (R., 290 and 293). This being an action at law where the value in controversy exceeds $20 and there being evidence entitled to consideration, showing that the city had valid defenses against the cross-answer of the Investment Co., the trial court in directing a verdict against the city and the circuit court of appeals in affirming that action deprived the city of its right of trial by jury guaranteed by the Seventh Amendment to the Constitution of the United States. The suit being between citizens of different States involving exceeding $12,000, the Federal court had jurisdiction and this Court has jurisdiction to review any ruling of the circuit court of appeals or of the district court deemed erroneous.

Under Section 28 of the Judicial Code, it is the suit and not the separable controversy only that is removed to the Federal court. Therefore, if there existed a separable controversy authorizing the removal of the suit, the District Court of the United States acquired jurisdiction of the entire case (Barney *vs.* Latham, 103 U. S., 205; Brooks *vs.* Clark, 119 U. S., 502; City of Beaumont *vs.* Fall, 291 S. W., 202).

## Statement of the Case.

Gainesville is a Texas municipality incorporated as a city of exceeding 5,000 under a special act of the Legislature approved March 17, 1909, of which the courts take judicial notice (Special Laws of the 31st Legislature, 501 and 537) R., 131).

On the 20th of November, 1919, a contract was signed by the city and the Construction Co. (not conceded to be valid) (R., 138 concerning some paving to be done by the Construction Co. Under the contract, the city was to pay for the street intersections and for one-fourth of the other work, while the Construction Co. looked to the abutting property owners for the remaining three-fourths (R., 137).

It was contemplated that the city's part of the paving would amount to $50,000. The Construction Co. agreed to accept the legally issued warrants of the city at par for the city's proportion of the cost (R., 140), to be paid monthly on the first regular meeting of the council after the first day of the month, as the work progressed on the engineer's written estimates, the city reserving 10 per cent until final completion (R.,

156). The work was delayed for various causes and up to September 20, 1920, the city's part of the only paving done amounted to $3,000, for which the city, on the 6th day of April, 1920, issued three warrants numbered one, two and three, for $1,000 each (R., 251), payable in one, two and three years, respectively, which warrants were paid at maturity. On or shortly prior to September 10th, 1920, some understanding was had not shown on the record by which the city was to issue the remaining $47,000 of warrants in advance of the work. In furtherance of this understanding, H. W. Head on September 10th, 1920, signed and delivered to the city this obligation:

SHERMAN, TEXAS, September 10, 1920.

To the City Council,
Gainesville, Texas.

GENTLEMEN:

By virtue of an order from the Southern Surety Construction Company any moneys due said Southern Const. Co., from the city of Gainesville for work done and materials furnished under a contract for street improvements is to be paid to me, said amounts being payable in city warrants.

I understand it is now the purpose and intent of the City Council of Gainesville, Texas, to have issued to said Southern Const. Co. ten thousand dollars in warrants, these warrants to be properly endorsed by Southern Const. Co., and delivered to me.

In the event of any dispute, discrepancy or other contingency arising which might in any

way affect the amount of work done or materials furnished by Southern Const. Co. so as to in any way affect said ten thousand dollars in warrants I hereby agree to protect and indemnify said City of Gainesville, Texas, up to the sum of ten thousand dollars.

None of said money will be paid or credited to Southern Const. Co., except in such amounts as may be shown to be due under signature of Mayor of Gainesville, Texas, and when such amounts shall equal ten thousand dollars then this obligation to be discharged.

In case of suit arising out of the matters set out herein or in case suit becomes necessary to enforce any rights secured hereby, such suit shall be filed in Cooke County, Texas.

H. W. HEAD.

This obligation was guaranteed by the Surety Co. (R., 13). On October 4, 1920, H. W. Head signed and delivered to the city an obligation precisely like the above except the warrants contemplated amounted to $37,000 (R., 15), which obligation the Surety Company guaranteed (R., 15). Thereafter, on the 21st of September, 1920, $10,000 of warrants were issued (R., 171), and on the 5th of October, 1920, $17,000 (R., 167); and on November 2, 1920, $10,000. (R., 172); and November 16, 1920, $10,000 (R., 172); making in the aggregate $47,000. These warrants were issued pursuant to resolutions of the same date.

The warrants when issued were immediately delivered to the Construction Co., and were immediately endorsed and delivered by the Construction Co. to

H. W. Head, who immediately delivered them to the Investment Co., the latter paying Head therefor 95¢ on the dollar.

Early in January, 1921, the Construction Co. again began work (R., 179) and did paving amounting to $34,736.29, including the $3,000 paid for in April, 1920 (R., 19 and 179 and 181), and quit. Thus leaving undone $15,263.71 of the $50,000 which the city had attempted to pay for in warrants (R., 19). On October 11, 1921, the city brought suit against the Construction Co., H. W. Head, and the Surety Co., in the District Court of Cooke County, Texas, to recover $15,000 of them as the difference between the paving paid for and the paving received and against the Construction Co. for $4,090 for claims against it alone (R., 119). Default judgment was rendered against all defendants for $15,000, and against the Construction Co. alone for $4,090 for other things (R., 120). This judgment was reversed upon appeal by Head and the Surety Co. upon the ground that the petition did not allege sufficient facts to support it. (Head *vs.* City of Gainesville, 254 SW., 323.)

Upon the remand of the case to the District Court for Cooke County, Texas, the defendant, Head, answered and alleged among other things that the warrants in question were illegally issued, void, and of no value (R., 120). Thereafter, on December 10, 1923, the city filed its first amended original petition making the Investment Co. a defendant, and while still alleging that the warrants constituted valid legal and binding promises and obligations of the city prayed in

case the court held otherwise, that the warrants be canceled and declared void (R., 121).

The case was next removed to the District Court of the United States for the Eastern District of Texas, upon the petition of the Investment Co. claiming that there existed in the case a separable controversy. There being no question in the trial court or in the circuit court of appeals in reference to the sufficiency of the pleadings to raise the question discussed, we believe that their substance need not be stated here. By cross answer filed May 17, 1926, the Investment Co. sought to recover judgment of the city for past due warrants 7, 8, 9, 10, 11, and 12 for $1,000 each, and on past due coupons on all of the warrants (R., 100). These warrants, while among the first maturing, were the last issued having been authorized by the resolution of November 16, 1920 (R., 172). To this cross answer, the city replied by first amended supplemental petition alleging the facts connected with the transaction and that the Investment Co. not only acquired the warrants with notice of the real facts, but devised the scheme under which they were issued (R., 102). There was no question in reference to the sufficiency of the amended supplemental petition.

The warrants were for $1,000 each, numbered one to fifty, inclusive, dated November 20, 1920, bearing interest at the rate of 6 per cent per annum from that date, payable semi-annually. Two of the warrants were payable each year to March 1, 1930, and thereafter three were payable each year. The warrants (R., 245) were in the following form:

No. ——.

UNITED STATES OF AMERICA.

STATE OF TEXAS,
*County of Cooke:*

City of Gainesville Street Improvement Warrants.

Series ——.

This is to certify that the City of Gainesville, County of Cooke and State of Texas, for value received, is justly indebted and promises to pay to The Southern Construction Company Contractor, their assigns or bearer, on the 1st day of March, 19—, at the office of The Brown-Crummer Investment Company, Wichita, Kansas, the sum of

One Thousand Dollars

in lawful money of the United States of America, with interest thereon from date hereof until paid at the rate of six per cent (6%) per annum, payable on the 1st day of March, 1920, and semi-annually thereafter on September 1st, and March 1st of each year; and the City Treasurer is authorized, ordered and directed to pay to the said Southern Construction Company, their assigns or bearer, said principal sum, together with interest payable at the place above named, upon presentation and surrender of warrant or proper coupon.

This Warrant is one of a series of Fifty (50) inclusive, in the denomination of One Thousand

($1,000) Dollars, issued for the purpose of evidencing the indebtedness of the City of Gainesville, Texas, to the Southern Construction Company, their assigns or bearer for the construction of certain street improvements in accordance with the terms and stipulations of contract of date November 20, 1919, and the proposal and plans attached thereto and made part thereof, under and by virtue of the Constitution and laws of the State of Texas, and pursuant to an ordinance passed by the City Council of said City of Gainesville, Texas, on the 2nd day of December, 1919, recorded in Book 6, at page 570 et seq., of the Minutes of said City Council.

The date of this warrant, in conformity with the ordinance above mentioned, is November 20, 1919.

And It Is Hereby Certified and Recited That all acts, conditions and things required to be done precedent to and in the issuance of this warrant have been properly done, happened and performed in regular and due time, form and manner, as required by law, and that the total indebtedness of said City, including this warrant, does not exceed any constitutional or statutory limitation.

In Witness Whereof the City of Gainesville has caused the corporate seal of said City to be hereto affixed and this warrant to be signed by its Mayor, and countersigned by its City Secretary, and registered by the City Treasurer, as of the date last above written.

E. N. BLACKBURN,
*Mayor, City of Gainesville, Texas.*

Countersigned:
S. A. BRYAN,
*City Secretary,*
*City of Gainesville, Texas.*

W. H. GARMANY,
*City Treasurer,*
*City of Gainesville, Texas.*

The form of the interest coupons was as follows (R., 247):

No. —. $30.

On the 1st day of March, 1920, The City Treasurer of the City of Gainesville, Texas, will pay to the Southern Construction Company, their assigns or bearer, at the offices of the Brown-Crummer Investment Company, Wichita, Kansas, the sum of Thirty ($30) Dollars, the same being six months' interest due that day on City of Gainesville, Texas, Street Improvement Warrant, Series ——, No. —, dated November 20, 1919, to which this coupon is attached and is a part thereof.

E. N. BLACKBURN,
*Mayor.*

S. A. BRYAN,
*City Secretary.*

At the time of the issuance of these warrants no work had been done. These so-called warrants are in fact bonds, and void because not authorized by the qualified tax-paying voters of Gainesville at an election held for that purpose.

Article 701 of the Revised Statutes of 1920, page 229, says:

> "The bonds of a county or an incorporated city or town shall never be issued for any purpose unless the proposition for the issuance of such bonds shall have been first submitted to the qualified voters who are property taxpayers of such county, city or town."

Section 1, Article 4 of the charter of the city says:

> "No bonds shall be issued for any purpose in excess of $2,500 unless an election be ordered by the mayor and city council, and if at said election the majority of the votes polled shall be in favor of creating such debt it shall be lawful for the city council to make the issuance of the bonds as proposed in the ordinance submitting the same at the election so held" (R., 129).

The provisions of Article 701 of the statute overrides the provision of the charter authorizing the issuance of bonds to the amount of $2,500, which prohibits their issuance in any amount without the consent of the qualified taxpaying voters (City of Beaumont *vs.* Fall, 291 S. W., 202; Foster *vs.* City of Waco, 225 S. W., 1104; 113 Tex., 352; Pulte *vs.* Keel, 297 S. W., 241; Robertson *vs.* Breedlove, 61 Tex., 316; San Patricio County *vs.* McClane, 44 Tex., 392; Brenham *vs.* German American Bank, 144 U. S., 173).

Section 16, Article 9, of the Charter (R., 130), and Article 545 of the Revised Statutes in force in 1909, and now Article 1083, page 322, of the Revised Statutes of 1925, says:

"Whenever the city council shall determine to make any such improvement, they shall cause an estimate to be made of the probable cost thereof by the city engineer, or by some other officer of the city, or by a committee of three aldermen; and such engineer or other officer or committee shall also report a full list of all lots or fractional lots, giving number and size of the same, and the number of the block in which situated, and the names of the owners thereof, if known, and such other information as may be required by the city council; and if there be a lot or fractional lot the owner of which is not known, the same shall be entered on said list as unknown. The officer or committee aforesaid shall enter on said list, opposite each lot or fractional lot lying and being on each side of the street, avenue or alley so to be improved as aforesaid, one-third of the estimated expense for such work or improvement on such avenue, street or alley fronting, adjoining or opposite such lot or fractional lot; and, on the acceptance and approval of said report and list by the city council, said amount shall be imposed, levied and assessed as taxes, and shall be a lien upon the property until the payment of the same."

There is no pretense that this preliminary estimate was made or that this statute was complied with.

Section 6, Article 7, of the charter says:

"The city council shall sit with open doors, shall keep a journal of its proceedings, which shall be public and constitute one of the archives of the city. The council shall act only

by ordinance, resolution or motion * * *. The ayes and nays shall be taken upon the passage of all ordinances or resolutions and entered upon the journal of its proceedings, and every ordinance, resolution or motion shall require on final passage the affirmative votes of a majority of all members of the city council present" (R., 131).

The minutes of the council show this:

"September 16th, 1919.—Alderman Thomas made a motion that the city engineer prepare plans and specifications and advertise for bids for paving the courthouse square and Commerce Street from California Street to Scott Street with brick. Motion carried." (Book 6, page 524.)

"On motion of Alderman Thomas, the council agreed to pave the intersections on any street that Mr. Levy, the paving contractor, can sign up the property owners on, and the council gave him an option on Lindsay Street and East and West California Street." (Book 6, page 524.)

"On motion of Alderman Barrett, the contract with Mr. R. G. Carraway, paving engineer, was ordered signed by the mayor and secretary when same was approved by the city attorney." (Book 6, page 528.)

This is all the record shows.

The failure to comply with the statute in reference to the estimate of the probable costs rendered the contract and all proceedings thereunder void (Frosh *vs.*

City of Galveston, 73 Tex., 401; City of Corsicana *vs.* Kerr, 89 Tex., 461).

Section 28, Article 2, of the charter says:

> "All contracts, of whatever character, pertaining to public improvements, or the maintenance of public property of said city, involving an outlay of as much as two hundred and fifty dollars ($250), shall be based upon specifications to be prepared and submitted to and approved by the mayor and city council, and after approval of the mayor and city council, advertisement for the proposed work, or matters embraced in said proposed contract, shall be made, inviting competitive bids for the work proposed to be done, which said advertisement shall be put in a daily newspaper not less than ten times. All bids submitted shall be sealed and shall be opened by the mayor in the presence of a majority of the aldermen, and shall remain on file in the mayor's office and be open for public inspection at least forty-eight hours before any award for said work is made to any competitive bidder. The council shall determine the most advantageous bid for the city, and shall enter into contract with the party submitting the lowest secure bid, but shall always in every advertisement of public work or contract involving as much as $250, reserve the right to reject any and all bids. Pending the advertisement of the work or contract proposed, specifications therefor shall be on file in the office of the mayor, subject to the inspection of all parties desiring to bid." (R., 126.) (Special Laws, 31st Legislature, 513.)

There is no pretense that this provision of the charter was complied with.

The motion of September 16, 1919, was that the city engineer prepare plans and specifications and advertise for bids for paving the courthouse square and Commerce Street from California Street to Scott Street with brick (R., 173).

The advertisement for bids and instructions to bidders show upon their face that plans and specifications had not been approved by the city council and were not on file in the office of the mayor subject to the inspection of all parties desiring to bid, but were in the office of the engineer and a copy could be procured by a deposit of $10 (R., 133, 134). There were never any plans and specifications approved or filed. The only ones among the papers or records of the council are the copies attached to the bids.

While the motion says "The courthouse square and Commerce Street from California Street to Scott Street," Dixon and Davis Streets were also paved (R., 179).

The specifications did not mention any street but merely specified the kind of material, work, etc. (R., 141 to 165), nor did the instructions to bidders mention any streets (R., 131-134), nor did the bids mention any streets (R., 134 to 137). The only thing on the city's record in reference to the acceptance of the bid of the Construction Co. is this, appearing on the minutes of November 19, 1919:

> "Alderman Thomas made a motion that the bid of the Southern Construction Company be

accepted as presented leaving off construction bond required and the contractor put up $5,000 in collateral satisfactory to the council and pave with brick on the square, Dixon Street to Broadway, Commerce Street to Scott Street, material to be left open, Dixon Street to M., K. & T. R. R., material to be left open and the mayor and secretary be authorized to make the contract with the Southern Construction Company. A yea and nay vote was taken and resulted in eight yeas and no nays'' (R., 164).

The warrants were fraudulently issued pursuant to a scheme devised by the Investment Company who acquired them with full notice. For $15,263.17 of such warrants the city has received no consideration. On the 19th of November, 1919, the day upon which the contract was awarded, the Investment Co., by J. E. Blaine, its agent, agreed to purchase the warrants from the Construction Co. at $.95 on the dollar (R., 207). The Investment Co. thereupon employed Harris, McCall & Graham, Dallas attorneys, to look after the matter. They prepared in duplicate the ordinance of December 16, 1919, confirming the contract and providing for the issuance of the warrants and on December 15, 1919, mailed them to the city secretary (R., 209). In this letter they instructed the secretary in reference to the passage of the ordinance and requested him to certify to the copy which they were enclosing and return it to them as a permanent record to be retained by the purchaser (R., 210). It is a justifiable presumption that Harris, McCall & Graham posted themselves in reference to what was done in order to be able to

pass upon the validity of the warrants. This ordinance of December 16, 1919, occupies pages 231 to 250 of the record. It recited that the contract was based upon specifications prepared and submitted to and approved by the mayor and city council which was untrue (R., 241). It further recites that the bids after being opened remained on file in the mayor's office open for public inspection for at least forty-eight hours before the contract was awarded to the successful bidder, which was untrue (R., 242). It further falsely recided that the Construction Co. had given bond in accordance with Section 29 of the charter, securing the faithful performance of the contract and securing the rights of subcontractors, materialmen and laborers (R., 243).

Section 29, Article 2, of the charter says:

> "The council shall require good and sufficient bond of the contractor with at least two good and sufficient sureties who shall be residents of the State of Texas" (R., 127).

Under Article 5161, page 1448, Revised Statutes, a contractor for public works and improvements is required before commencing work to execute the usual penal bond with additional obligation that such contractor shall promptly make payments to all persons supplying him with labor and materials in the prosecution of the work provided for in such contract. A penal bond is generally in double the amount involved and never less than the amount involved. The instructions to bidders required that the successful bidder should furnish bond in the amount of the bid from

a responsible surety company or from good and sufficient personal sureties (R., 133). The specifications and bid required a maintenance bond in the sum of 25% of the total cost of the improvement (R., 157). The bid of the Construction Co. bound the contractor to execute a construction bond for the performance and completion of the work and to keep the completed work in a state of repairs for five years (R., 134). After the bids were opened the bid of the Construction Co. was accepted, leaving off the bonds and substituting in lieu thereof collateral security of the value of $5,000, but the collateral was never put up. The contract contemplated expenditures by the city and abutting lot owners of exceeding $150,000, yet only $5,000 collateral was to be put up to secure the performance of this contract, payment for the work and material and the maintenance of the completed work for a period of five years. The contract as signed leaves out the construction bonds, the maintenance bond and the penal bond. The fact that these bonds were required of bidders certainly influenced their bids and caused them to bid higher than they otherwise would. The bonds and the agreement to maintain the work were parts of the contract bid on. The contract made must be the same as that bid on. (Dillon on Municipal Corporations, Vol. 2, Section 807, page 1213.)

Harris, McCall & Graham, after the ordinance of December 16, 1919, had been passed and approved, made material changes in the certified copy which had been sent to them as appears from their letter to J. E. Blaine, dated January 2, 1920, and directed that Blaine

see that the same changes were made in the original (R., 210). This letter Blaine sent from Wichita, Kansas, on January 8, 1920, to the city secretary and requested the secretary to look at the original and to be sure that the corrections enumerated were made (R., 212). The ordinance was passed and approved on December 16. Yet early in the following January, material changes were made in it by the attorneys for the Investment Co. and by the secretary at the solicitation of Blaine, the agent of the Investment Co. It seems that Harris, McCall & Graham were indifferent as to the real facts if things appeared regular on the record. On the 19th day of June, 1920, the Investment Co., through J. E. Blaine, its agent, entered into a contract with the city, in which the Investment Co. agreed to furnish the legal proceedings for the issuance of the warrants to the Construction Co. and to defray the expense of printing, as well as all other matters incidental to their issuance, in consideration of which the city agreed to pay to the Investment Co. 5% on all warrants, including the $3,000 issued in April, 1920 (R., 206). The resolutions of September 21, October 5, and November 2 and November 16 were prepared in Dallas in duplicate by Harris, McCall & Graham, the attorneys for the Investment Co., and were brought from Dallas to Gainesville by J. E. Blaine, the agent of the Investment Co. The carbon was used by the city and the original certified to and retained by Blaine. To the original resolution was attached affidavits to be made by the mayor and each alderman to the effect that they had inspected the paving and that it was

actually completed and the amount justly due. The council met at 7:30 at night and the resolutions were passed, the original certified and the affidavits made before adjournment (R., 171). Although the mayor was sick, these resolutions prepared at Dallas recited that he was present. When the council would adjourn, Levy of the Construction Co. and Blaine would go to the residence of the mayor and have him sign the papers (R., 184). The warrants as they were issued were endorsed by the Construction Co. and delivered to H. W. Head, who resided at Sherman, Texas. Head would draw upon the Investment Co. at Wichita, Kansas, for 95% of the principal of the warrants attached (R., 191, 193). Mr. Harris would send to the Investment Co. in every instance a copy of the record with his opinion endorsed. The 95% which H. W. Head received for the warrants never reached the city treasury. As these warrants were from time to time issued to the Construction Co., J. E. Blaine, its agent, was on hand and demanded and received the 5% which the city had agreed to pay (R., 214). The resolutions and the warrants for the 5% bear the same date (R., 214). The Investment Co. also demanded and received from the city the interest that had accrued on the warrants from November 20, 1919, to the time they were delivered by Head, which was something more than a year (R., 213). J. E. Blaine knew at the time the resolutions were passed and the warrants issued that the paving had not been done (R., 216).

The certified copies of the resolutions of September 21st, October 5th, November 2d, and November 16th,

produced by the witness Crummer, were certified to by S. A. Bryan, city secretary. These were typewritten with the exception of the blanks filled in with a pen. They are the originals of the carbon copies that were left with the council, and used by them. These resolutions were approved by the mayor upon the day of their passage and were certified to by the city secretary on the same day, and to each were attached the affidavits made on the same day by the mayor, aldermen and city secretary, before a notary public, and the certificate dated upon the same day in reference to the signatures of the mayor, secretary and treasurer. In other words, everything in the matter of certificates, affidavits and the like bear the same date as the passage of the resolution. The affidavits of the mayor, secretary and aldermen said that the statements contained in the resolutions were true and correct, and that the materials so furnished and the work so performed and covered by the estimate or claim had been by the council inspected and accepted and found to be in accordance with the contract and plans and specifications and had been determined by said council to be well worth the price agreed to be paid therefor as reflected in said statement of account or estimate, and that the City of Gainesville had received full value for the money represented by said warrants. To each of these transcripts was attached the certificate of W. M. Harris saying that he had examined the copy of the proceedings and the warrants and that in his opinion such proceedings show lawful authority and that he found the warrants to

have been properly executed and that in his opinion the warrants were valid and legally binding upon the City of Gainesville (R., 193 & 194).

Blanks were left in the typewritten resolutions sent from Dallas to Gainesville for the insertion of the estimates which the Construction Co. filled in by merely writing $1,700 for material furnished and work performed in one, and $10,000 in the other three (R., 169). The Investment Co. maintained correspondence with J. E. Blaine until the last warrants were paid for (R., 198). Neither J. E. Blaine nor any member of Harris, McCall & Graham was produced by the Investment Co. R. E. Crummer, the vice-president and manager of the Investment Co., was the only witness produced to show want of knowledge of the real facts. It was the duty of J. E. Blaine as representative of the Investment Co. to investigate and report on pending bonds and municipal issues (R., 195). Judge Harris looked after the transaction until it was completed (R., 195). Crummer testified: "I don't know what was in the contract between the city and the Construction Co." (R., 196). A letter from him to Blaine, dated June 18, 1920, shows that he did know the provisions of the contract (R., 203). The expression, "work performed and material furnished," as recited in the resolution did not strike him as peculiar (R., 196). He said he presumed the city officials prepared the resolution (R., 196). This he said though he had contracted to furnish the legal proceedings and his attorneys, Harris, McCall & Graham, prepared the resolutions and his agent Blaine brought

them to Gainesville and presented them to the council. There having been no election, these warrants must be sustained, if at all, as ordinary warrants upon the treasury to pay claims audited and allowed. Such warrants are not negotiable under the law merchant and are subject to any defense which the city has, such as fraud, illegality or failure of consideration, although transferred to someone who had no actual notice (Dillon on Municipal Corporations, Vol. 2, Sec. 856). Wall *vs.* County of Monroe, 103 U. S., 74; Mayor *vs.* Ray, 19 Wall., 468; Watson *vs.* City of Horon, 79 Fed., 449; San Patricio County *vs.* McClane, 44 Tex., 392; Lane *vs.* Hunt County, 35 S. W., 10; Shock *vs.* Colorado County, 315 S. W., 61; Lasater *vs.* Lopez, 110 Tex., 185; 217 S. W., 376; Robertson *vs.* Breedlove, 61; Tex., 316; Allan *vs.* Abernathy, 151 S. W., 348.

The provision of the charter in reference to approved plans and specifications are mandatory, and the failure to comply therewith renders the contract and the proceedings thereunder void. (Dillon on Municipal Corporations, Vol. 2, Secs. 806 and 807.) Limestone County *vs.* Knox, 234 S. W., 131.

Section 28, Article 2, of the charter, *supra,* says that bids, after being opened, shall remain on file in the mayor's office for public inspection at least forty-eight hours before any award for said work is made to any competitive bidder (R., 127). The minutes show that the council convened at 7:30 p. m. on November 18, 1919, and opened the bids (R., 128), and laid them over until November 19 and adjourned to meet at 7:30

p. m. on that date (R., 164), and that the council did meet at 7:30 p. m. on November 19 and awarded the contract to the Construction Co. (R., 164). The prescribed delay of forty-eight hours after the opening of the bids was intended to give time for inspection and consideration and to allow any citizen or other person interested to interpose any objections thereto. It is a mandatory provision that the council could not disregard at its pleasure.

The specifications, instructions to bidders, and the contract says: "The contractor in the construction of the work shall give preference in employment to citizens of the aforesaid city, and when citizens of said city are not available, shall give preference to citizens of the State of Texas" (R., 146). This provision is well calculated to hamper the contractor and increase the costs of the work. The charter of the city, the State statute, and the common law confer upon municipalities no authority to insert such provision in contracts. "A contract prohibiting the employment of any person or persons other than native born or naturalized citizens of the United States is illegal." (Dillon on Municipal Corporation, Vol. 2, Sec. 808).

The facts giving rise to the questions above discussed were alleged in the pleading and sustained by the evidence. They were also urged upon the trial court by requested instructions and by objections to the instructions given, reserved in the bill of exception and presented on error to the circuit court of appeals by specifications and brief.

Section 16, Art. IX, of the charter (R., 130), and Article 544 of the then Revised Statutes, which is Article 1082, page 322 of the present statute, says in reference to the costs of street improvements: "The city council shall pay one-third and the owner of the property two-thirds thereof, except at the intersection of streets, from lot to lot across the streets either way shall be paid for by the city alone. Said costs shall be assessed on the property fronting on said street so improved, to be collected in equal annual payments, not less than five in number. All moneys collected from these assessments shall be appropriated exclusively to the payment of the bonds issued for the payment of the costs of said improvement." Under the ordinance and contract under consideration three-fourths of the costs was assessed against the abutting lot owners, payable one-third on demand and one-third in one, and one-third in two years from date (R., 152 and 153).

**Specification of Errors.**

The specifications of error filed in the trial court and presented to the circuit court of appeals, and relied on here are as follows:

1

The court erred in refusing to give the first instruction requested by the plaintiff as follows:

> "The treasury warrants issued by the City of Gainesville to the Southern Construction Company described in the pleadings are void and of no validity, because issued without the

consent of the qualified voters of the city of Gainesville granted at an election held for that purpose."

2

The court erred in refusing to give the second instruction requested by the plaintiff as follows:

"The contract between the City of Gainesville and the Southern Construction Company and all proceedings thereunder are void, because said contract, among other things, was made without any preliminary estimate of the cost of the proposed street improvement as prescribed by the charter and the statute."

3

The court erred in refusing to give the third instruction requested by the plaintiff as follows:

"Under Sec. 28, Art. 2 of the Charter of the City of Gainesville contracts are required to be let to the lowest responsible bidder, after the adoption of specifications and the giving of notice. The contract in question having been changed in material respects after the bids were received, without being re-opened to competitive bidding as changed, is void."

4

The court erred in refusing to give the fourth instruction requested by the plaintiff as follows:

"The warrants issued by the City of Gainesville to the Southern Construction Company

are not negotiable instruments, and anyone acquiring such warrants takes subject to any defense that the city would have against them in the hands of the original holder."

5

The court erred in refusing to give the fifth instruction requested by the plaintiff as follows:

"Under the charter of the City of Gainesville in respect to street improvement the city could not pay for the paving of streets by the issuance of long-time warrants; but if without funds to pay for such improvement, the money therefor could not only be raised by the issuance of bonds pursuant to the consent of the qualified voters granted at an election held for that purpose; and that not having been done in this case the contract and the warrants issued pursuant thereto are illegal and void."

6

The court erred in refusing to give the sixth instruction requested by the plaintiff as follows:

"The instructions to bidders and the specifications and contract in question required that the contractor in the employment of labor should give preference to the citizens of Gainesville; and in default of citizens of Gainesville, to citizens of the State of Texas. These provisions were illegal and interfered with fair competition and rendered the contract and all proceedings thereunder void."

7

The court erred in refusing to give the seventh instruction requested by the plaintiff as follows:

> "The unquestioned proof shows that the City of Gainesville received no consideration for $15,263.73 of the Series of $50,000 of warrants issued by it, and that said excess of warrants over the amount of paving done are without consideration and uncollectible."

8

The court erred in refusing to give the eighth instruction requested by the plaintiff as follows:

> "In the acquisition of warrants notice to the agent is notice to the principal, and if J. E. Blaine knew that the warrants in question were issued before the paving, as to which each set of warrants applied, was done and were issued when nothing was due under the contract, then the Brown-Crummer Company is in no better position than the Southern Construction Company, and the Brown-Crummer Company acquired such bonds, if at all, subject to all the defenses the City of Gainesville had against them."

9

The court erred in refusing to give the ninth instruction requested by the plaintiff, as follows:

> "If J. E. Blaine was the agent of Brown-Crummer Company in the purchase of the warrants in question and during said agency and

before Brown-Crummer Company received the warrants and paid therefor said Blaine knew that they were issued for paving not done and in advance of the performance and acceptance of the work, then the Brown-Crummer Company acquired such warrants subject to all the defenses the City of Gainesville had against the same."

10

The court erred in refusing to give the tenth instruction requested by the plaintiff, as follows:

"If the evidence shows that J. E. Blaine was the agent of Brown-Crummer Company, you are then instructed that the knowledge of Blaine would be the knowledge of the Brown-Crummer Company. You are further instructed that in order for Blaine to have been the agent of Brown-Crummer Company it was not necessary for him, at the time of the transactions, to have been in their employ, receiving a salary, but if they entrusted him with the handling of the transactions with regard to the warrants and the purchase of the same, and carrying out these transactions, then you are instructed that this was sufficient to constitute him an agent."

11

The court erred in refusing to give the eleventh instruction requested by the plaintiff, as follows:

"It appears from the evidence that Mr. Harris was the attorney for Brown-Crummer Company in preparing sundry papers in the case,

by virtue of which certain ordinances were passed and the warrants issued; you are instructed that the knowledge of Mr. Harris was the same as the knowledge of Brown-Crummer Company."

12

The court erred in refusing to give the twelfth instruction requested by the plaintiff, as follows:

"The contract for the paving and the ordinances under which it was made prescribed that the abutting lot owner shall pay for three-fourths of the cost of the improvement in front of his property, in three annual installments, bearing interest at the rate of 8 per cent per annum, while the charter required that the abutting lot owner should pay for only two-thirds of the cost of improvement in front of his property, and that the assessments therefor should be payable in equal annual installments, not less than five in number; the failure of the contract and ordinances to comply with the charter in these respects renders the contract and all proceedings thereunder void."

13.

The court erred in refusing to give the following instruction requested by the plaintiff:

The contract between the city of Gainesville and the Southern Construction Co. is void because the unquestioned proof shows that the contract was awarded within less than forty-eight hours after the bids were opened.

14.

R. E. Crummer being an interested party, the jury were the sole judges of his credibility and did not have to accept his evidence as true, and the court therefore erred in instructing a verdict in favor of the Brown-Crummer Investment Company, based solely upon the testimony of said Crummer.

15.

The warrants in question not being negotiable instruments, the court erred in assuming that the Brown-Crummer Investment Co. was a *bona fide* holder, entitled to the protection accorded to *bona fide* holders of negotiable paper, and therefore erred in instructing a verdict in favor of said company.

16.

W. M. Harris, being the agent of the Brown-Crummer Investment Co. to furnish the proceedings in reference to the issuance of the warrants, and to see that everything was in proper shape, notice to him was the same as notice to the Brown-Crummer Investment Co., and the court therefore erred in instructing a verdict in favor of said company.

17.

J. E. Blaine, being unquestionably the agent of the Brown-Crummer Investment Co. in the purchase of the warrants in question, and there being abundant evi-

dence tending to show that said Blaine knew that the warrants were issued before the acceptance or performance of the work, and that the recitals in the resolution for their issuance were false, the court erred in instructing a verdict in favor of the Brown-Crummer Investment Company.

18.

The unquestioned proof showing that the city of Gainesville lacked something over $15,000 of receiving the paving that should have been constructed to entitle the Southern Surety Co. to the $47,000 of warrants, and there being no proof showing or tending to show that H. W. Head paid out upon orders approved by the mayor of Gainesville sums of money aggregating $47,000, the court erred in instructing a verdict in favor of the defendant Head and the Southern Surety Co.

19.

There being no proof that H. W. Head paid out any sums of money upon orders approved by the mayor of Gainesville, the court erred in instructing a verdict in favor of his executor.

20.

The warrants sued on being the last issued, the plaintiff received no consideration therefor or the consideration has wholly failed, therefore the court erred in directing a verdict against the plaintiff on said warrants.

21.

The court, in directing a verdict in favor of the Brown-Crummer Investment Co., deprived the plaintiff of its right of trial by jury, guaranteed by the Seventh Amendment to the Constitution of the United States.

22.

The circuit court of appeals erred in holding that it was without jurisdiction of a controversy between the city of Gainesville and the Southern Surety Company and H. O. Head, as executor of H. W. Head.

## ARGUMENT.

"A warrant," says Judge Dillon, "is a command of the council, board, or official whose duties it is to pass upon the validity and determine the amount of a claim against the municipality to the treasurer to pay money out of any funds in the city treasury, which are or may become available for the purpose as specified, to a designated person whose claim therefor has been duly adjusted and allowed." (Dillon, Volume 2, Section 850.)

"Being simply a means of paying a debt, it is necessarily implied that a valid debt or obligation of the corporation exists for which a warrant may be drawn. The warrant does not constitute a new debt, or evidence of a new debt, but is only the prescribed means for drawing money from the municipal treasury to pay an existing debt. It may also be laid down that, as a

general rule, the power to issue a warrant does not exist until the audit and allowance of the claim in the manner prescribed by statute." (Dillon, Volume 2, Section 851.)

Warrants cannot be issued and sold by the municipality in order to acquire money for any particular purpose. That is the office of bonds. With the consent of the qualified tax-paying voters, granted in an election held for that purpose, bonds can be issued and sold in order to acquire money to improve streets and to do other things of a public nature. Warrants were never intended for any such purpose, and their attempted use for that purpose is but an evasion of the law against issuance of bonds. (Ashby *vs.* James, 226 S. W., 737.)

In disregard of good business methods and of a mandatory statute, the council entered into a contract with the Southern Construction Company without exacting the bonds required by law. Had the bonds been given, the Construction Company, although insolvent, would have had credit and could have complied with its contract, but, being insolvent and not being backed by any bond, it was without credit. The warrants were issued in advance of the work, with the expectation that they would be sold and the proceeds used by the Construction Company to pay for the work as it progressed. The warrants were not issued in settlement of accounts that were due, but were issued in an attempt to finance the insolvent Construction Company and enable it to go ahead with the paving. In other words, the warrants were issued and sold for the purpose of raising

money to pay for the paving as it progressed—a purpose for which warrants were never intended, and which could only be accomplished by the issuance of bonds.

The circuit court of appeals says that the warrants were *escrowed* with H. W. Head, but not so. The warrants were issued, delivered, sold and put in circulation. An instrument that has been delivered and put in circulation cannot be *in escrow*.

Among the cases relied on by the Investment Co. is Graves *vs.* M. Griffin O'Neil & Sons *et al.*, 189 S. W., 778. That is a decision of an intermediate court, entitled to very little weight as authority. Besides, it was an appeal from an order dissolving a temporary injunction, the granting or dissolving of which rests largely in the discretion of the court. In addition to this, the petition was not properly verified, and after so holding anything further was *obiter dictum* merely. In that case, the so-called warrants were issued in advance of performance, and the ordinance or resolution evidently recited performance. It is strange that the court did not perceive that anything is a fraud upon the law where false recitals are necessary to give it the appearance of validity. The decision is in conflict with the subsequent cases of Foster *vs.* City of Waco and Pulte *vs.* Keel, *supra*.

City of South Houston *et al. vs.* Carman, 6 Fed., 358, is also relied on. The question there was whether the inhabitants, after the dissolution of an illegally organized municipality, were liable for the debts contracted by it while a going concern. That question is not in-

volved here. It will be noted that J. L. Arlitt devised that scheme, and he has established quite a reputation as a handy man where aldermen and county commissioners are seeking to evade the law.

Slayton & Co. *vs.* Panola County, 283 Fed., 330, is another case relied on. That was another fraudulent scheme devised by J. L. Arlitt, and a grievous fraud was perpetrated upon the taxpayers of Panola County. That is one of the recent cases seeking to make the law of negotiable instruments apply to illegally issued warrants.

We do not see that Scott County, Arkansas, *vs.* Advance-Rumley Thresher Co., 288 Fed., 739, has any relevancy to the question. In that case the question of innocent purchaser was not involved, for the court conceded that a purchaser of a warrant takes subject to all defenses that could be urged against the original holder. (See page 745 of that opinion.) In Texas it has frequently been held that an unauthorized act can not be ratified, for the self-evident reason that where there is no power to do, there can be no power to ratify. (City of Bryan *vs.* Page, 51 Tex., 532.)

Grimes County *vs.* W. L. Slayton & Co., 262 S. W., 209, cited by the Investment Co., is another decision of an intermediate court. In that case J. L. Arlitt figured, as usual. There new warrants were issued in lieu of previous warrants, irregular but not void. That case has no bearing upon this. City of Belton *vs.* Brown-Crummer Investment Co., 17 Fed., 2d Series, 70, cited by the other side, involved some refunding warrants, and nothing is there decided in any manner affecting

this case. Evansville *vs.* Dennett, 161 U. S., 434, relied on by the other side, relates to negotiable bonds and has no application to treasury warrants.

Lasater *vs.* Lopez, 110 Tex., 179, is relied on by the other side. That case involved the validity of county warrants issued in settlement for work done on the public roads of the county. A constitutional and statutory duty rested on the county to provide roads, but, unless authorized by statute, the county could not issue negotiable bonds or paper. The county could, however, issue warrants or other evidence of any debt it really owed, but such warrants or evidence were subject to any defense which could be made against them in the hands of the original holder.

As shown by the opinion of the court of civil appeals in the same case, 202 S. W., 1041, the warrants were payable in yearly installments extending over a period of sixteen and one-half years and had attached to them interest coupons representing semi-annual interest at the rate of 6 per cent per annum.

The opinion shows that since the beginning of government it had been the duty of the commissioners' court to establish and maintain public roads, but the opinion is wrong if it intends to say that prior to the inhibition against the issuance of bonds without the consent of the taxpayers, long-time warrants with interest coupons attached were ever employed.

Section 1, Article IV, of the charter says:

> "The city council of the city of Gainesville shall have power and authority by ordinance duly passed, if it so elects, to borrow money on

the credit of the city for permanent improvements, for public buildings, for the permanent improvements of its streets, avenues, alleys, public grounds, building of sidewalks, macadamizing, remacadamizing, paving and repaving of streets, alleys, avenues and public grounds, and for the purpose of providing the city with funds for the ownership of public utilities, including water, light, sewer and gas works; and the city council may issue bonds for the city of Gainesville for all or any of the above purposes to any amount not exceeding $150,000 in any one year; provided, that in addition the said city is expressly authorized to issue bonds for the purpose of refunding the bonds of the city previously issued; provided, that the bonds be refunded at the same or a lower rate of interest than the bonds proposed to be retired draw. It is further provided that debt shall never be created by the city of Gainesville unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and create a sinking fund of at least 2 per cent thereon.

"No bonds shall be issued for any purpose except the purposes above named, which shall not exceed $150,000 for any one year and for the purpose of refunding bonds previously issued.

"No bonds shall be issued for any purpose in excess of $2,500 unless an election be ordered by the mayor and city council, and if at said election the majority of the votes polled shall be in favor of creating such debt, it shall be lawful for the city council to make the issuance of the bonds as proposed in the ordinance submitting

that the contractor had furnished labor and material in the amount of the estimate, that same had been inspected and accepted by the Council to be in accordance with the contract, plans and specifications, and determined by the Council to be well worth the amount reflected in the estimate, and that the claim in the estimate had been audited and found correct and had been approved, and that the City had received full value and consideration for the warrants mentioned in the resolution, and thereupon authorized and directed the delivery of said warrants. On each of said occasions the Mayor, Alderman and officials of the City of Gainesville further furnished to Brown-Crummer Investment Company an affidavit to the effect that the statements contained in the respective resolutions were true and correct, and that the work and material furnished had been inspected by the Council and accepted and found to be in accordance with the contract, plans and specifications and well worth the price reflected in the estimate, and that the City of Gainesville had received full value for the money represented by the warrants. To be sure, the form of these papers was furnished to the City by Brown-Crummer Investment Company according to the usual practice in the business, and according to the requirements of the contract for the purchase of the warrants.

It was but ordinary prudence on the part of Brown-Crummer Investment Company to require these supplemental affidavits, especially in view of the fact known to the City that its attorney passing on the warrants was not located in Gainesville, but resided in Dallas, Texas, and on account of the further fact, also known to the City, that Mr. Crummer, whose business it was to receive and pay for the warrants, was located at Wichita, Kansas. The contents of these papers furnished to the City fully disclosed to the City the conditions upon which Brown-Crummer Investment Company was willing to pay for the warrants. Furthermore, the City was explicitly advised by several letters already mentioned, received direct from said attorney, W. M. Harris, and from Mr. Crummer, that the warrants would be accepted and paid for only from time to time upon estimates as the job progressed. Nevertheless, the City adopted the resolutions above mentioned, and the City officials supported same by the affidavits above mentioned, and the City issued the warrants containing the representations above mentioned, and all of these from time to time as contemplated by the City were attached to the drafts, which were presented to Brown-Crummer Investment Company for payment. The undisputed evidence is that Mr. Crummer in each instance looked over the warrants and examined all of the documents

accompanying the drafts, and believing the recitals and representations contained in the warrants and in said documents to be true, and relying upon the truth of same, and relying also upon the accompanying approving opinions of his attorney, W. M. Harris, paid for the warrants in behalf of Brown-Crummer Investment Company, and would not have paid for them had he known of the existence of any of the alleged infirmities.

As to the contention that Brown-Crummer Investment Company had knowledge of any of the alleged infirmities, we will review the evidence bearing thereon after first presenting the authorities governing the above facts.

## AUTHORITIES

In the following cases it has been held explicitly that the doctrine of estoppel applicable to such facts involves a question of general commercial law upon which the Federal Courts will be governed by their own conception of the jurisprudence of the subject. See:

Presidio County vs. Noel-Young, 53 Law Ed. 402, 212 U. S. 58;

Swift vs. Thaison, 16 Pet. 1;

Oates vs. First National Bank, 1 U. S. 239, 246;

Burgess vs. Seligman, 117 U. S. 20, 33, 34;

Town of Pana vs. Bowler, 107 U. S. 529.

We now submit a succession of clear and powerful decisions emphatically applying the doctrine of estoppel against municipalities in cases similar to the one at bar. It will be noticed that many of these are Federal decisions, among them being a number of decisions of the Supreme Court of the United States, but it will also be noticed that the courts of this State have adopted and followed the jurisprudence of the Federal courts on the subject:

In Evansville vs. Dennett, 40 L. Ed. 760, 161 U. S. 434, the City was held estopped as against a bona fide purchaser of bonds from asserting that the bonds were not issued upon a petition of two-thirds of the resident freeholders of the City, and it was held that the purchaser could rely upon the recitations in the bonds that all necessary proceedings had been had in order to make them valid, and was not required to go behind the certificate upon the face of the bond to ascertain whether the proceedings of the City disclosed any defect in the bond, saying:

> "As therefore, the recital in the bonds import compliance with the City's charter, purchasers for value having no notice of the nonperformance of the conditions precedent were not bound to go behind the statute conferring the power to subscribe, and to ascertain by an examination of the ordinances and records

of the City Council whether these conditions have in fact been performed."

In Waite vs Santa Cruz, 46 L. Ed. 552, 184 U. S. 302, the bonds in question contained recitals substantially identical to those contained in the warrants in this case. If the ordinance authorizing the warrants had been examined by the purchasers, it would have disclosed a portion of the bonds invalid.

The U. S. Supreme Court said:

"The City of Santa Cruz had power, under the Constitution and laws of California, to refund its outstanding indebtedness, evidenced by bonds and warrants. The nature and extent of such indebtedness were matters peculiarly within the knowledge of its constituted authorities. When, therefore, the refunding bonds in suit were issued with the recitals therein contained, the city thereby represented that it issued them under and in pursuance of and in conformity with the act of 1893 and the Constitution of the state. As nothing on the face of the bonds suggested that such representations were false, purchasers had the right to assume that they were true, especially in view of the broad recital that everything required by law to be done and performed before executing the bonds

had been done and performed by the city. As there was power in the city to issue refunding bonds to be used in discharging its outstanding indebtedness of a specified kind, purchasers were entitled to rely upon the truth of the recitals in the bonds that they were of the class which the act of 1893 authorized to be refunded. They were under no duty to go further and examine the ordinances of the city to ascertain whether the recitals were false. On the contrary, purchasers could assume that the ordinances would disclose nothing in conflict with the recitals in the bonds."

In Presidio County vs. Noel-Young Bond Company, 53 L. Ed. 402, 212 U. S. 58, the United States Supreme Court again applied the same doctrine where the bonds contained similar recitations on their face, and the defect claimed was that **the bonds had been issued in excess of Constitutional authority and in violation of certain conditions precedent.**

In the City of South Houston versus Carman, 6 Fed. (Second Series), 358, the defects claimed among others were that South Houston exceeded its constitutional limit in levying taxes with which to pay the warrants, and also that the City got only 85c on the dollar for the warrants. The entire proceedings of the City were false and fraudulent from one end to the other, but con-

tained recitations and representations which, on their face, disclosed a legal and legitimate transaction. The securities involved were non-negotiable warrants, and it will also be noticed that they were in substantially the identical form as the warrants in this case. The warrants came into the hands of a party who had no knowledge of the defects. The Court held the City liable to such purchaser, saying:

> "Notwithstanding all this, Kidder & Company and the plaintiff in this case cannot appear in any other guise than that of innocent purchaser for value without notice."

As to the price which the City received for the warrants, the Court said:

> "It is true the warrants were sold at a considerable discount, but doubtless many obligations of small towns are sold at an actual discount of 15%, and the discrepancey is not so great as to be unconscionable."

Here, then, is a decision in which the instruments are non-negotiable warrants in any sense of the law merchant, and in which defects existed which would have rendered them uncollectible in the hands of one taking them with knowledge of the defects, and yet on account of the recitation and representations in the proceedings the City was held liable to an innocent purchaser.

Again, in Slayton & Company versus Panola County, Texas, 283 Federal, 330, the County had exhausted its constitutional power to levy taxes for road purposes. Desiring, nevertheless, to obtain money for roads, the County officials passed fraudulent proceedings in which it was recited that the County was indebted to Arlitt as evidenced by "warrants heretofore issued in payment of sundry claims", etc., and authorized the issuance of funding warrants to take up said alleged existing indebtedness. In fact, there was no such pre-existing indebtedness, and the whole scheme was a fabrication from one end to the other to circumvent the constitutional limitation upon the power of the County to levy taxes for further road money. The funding warrants were sold directly to W. L. Slayton at a discount of about 10 per cent. Slayton had no knowledge of any infirmities in the warrants which were non-negotiable instruments in substantially the identical form as those involved in this case, and which contained substantially the identical recitations and representations as the warrants in this case. The warrants when bought by Slayton were accompanied by certified copies of the proceedings, and by supporting affidavits furnished by the City officials in this case. The purchaser, as in this case, caused the validity of the instruments to be submitted to an attorney, and bought same

believing the representations and recitations above mentioned to be true. The Court first pointed out that the warrants are non-negotiable, saying:

> "The warrants themselves are not negotiable as that term is used in the law merchant, and it follows, therefore, that as regards their commercial status, any defense that the county may have can be asserted against the plaintiff herein."

The Court put then the following question:

> "Whether in a state of affairs such as outlined above a county can be permitted to urge the facts; that is, whether the county is estopped from claiming that the orders on which these warrants are based are void and then repudiate the obligations resulting from them."

Replying to this question, the Court held that although the warrants are not negotiable instruments, nevertheless the county officials in the discharge of duties entrusted to them by law had been guilty of conduct and made representations upon which the purchaser of the warrants had relied in buying them, and that to such facts the law attaches the old doctrines of virtue and honesty usually called estoppel, which forbids the County from investing its officers with authority to act for it in business relations and then evad-

ing the legal consequences of what they have done.

The Court said:

> "In using the power thus delegated to them, the Commissioners were transacting the routine business or exercising what some of the courts them the 'proprietary powers of the County.' The authorities are practically unanimous that as regards such routine or business engagements the doctrine of estoppel applies to municipal corporations just as to the individuals."

A very important recent decision in Texas is the case of W. L. Payne vs. First National Bank of Columbus, 291 S. W. 201, decided by Section "A" of the Commission of Appeals of this State, and approved by the Supreme Court of this State on February 9th, 1927. In that case warrants in substantially the identical form to those involved in the case at bar, were issued by the City ostensibly for the purpose of paying a certain contractor for certain bridge and street improvements, and appropriate proceedings were simulated for the purpose of making the transaction appear legal on its face in order that the warrants might be sold by the contractor in behalf of the City and the proceeds of sale used by the City itself in building the improvements. The con-

tractor received the warrants and sold them to one J. L. Arlitt for 85c on the dollar, and the proceeds were turned over to the City. Arlitt bought the warrants with full knowledge of the real facts, but they were finally bought by the First National Bank of Columbus, which was innocent of any infirmities. The bank sued the City to enforce collection of the warrants. Among other things it was contended that the real purpose for the issuace of the warrants being to borrow money, the warrants were void, and because the warrants are not negotiable instruments, they were subject to such defense in the hands of the bank. The Court said:

> "A proper disposition of this case does not require a consideration of the question as to whether or not the warrants are void for lack of authority in the city to borrow money in the manner it did, and a decision of that question is pretermitted. For even though the city were not authorized to borrow money as it did, it does not follow that the city may avail itself of that defense here.
>
> "The city, by virtue of Articles 854 and 857 of the Revised Civil Statutes of 1911, was expressly authorized to construct bridges and improve streets. The authority given by these statutes includes an implied authority to make

such improvements on credit; and to issue interest bearing warrants for the deferred payments of the price. Lasater vs. Lopez, 110 Tex. 179; Bridges vs. Lampasas, 249 S. W. 1083 (writ refused).

"The warrants are non-negotiable instruments. The general rule is to the effect that an assignee of a non-negotiable instrument takes it subject to all defenses held by the debtor. To this general rule there is a qualification which is aptly stated in 5 Corpus Juris, p. 966, in the following language:

> 'The general rule that an assignee acquires no greater rights than his assignor, is subject to the qualification that the debtor may by his representations or conduct estop himself to set up against the assignee defenses which were available to him against the assignor.'

"This qualification to the rule, in its application to the individual citizen, is founded in the soundest principles of equity. 2 Pm. Eq. Jur., Secs. 704 and 820; 2 R. C. L. p. 613; Cowdrey vs. Vandenburgs, 101 U. S. 573; Fugate vs. Hartford, 3 Litt. (Ky.) 263; Springle vs. Morrison 3 Litt. (Ky.) 52; Follett vs. Reese, 20 Ohio, 546; Jones vs. Hardesty, 10 Gill & J. (Md.) 404; Grisler vs. Powers, 81 N. Y. 57; Lee vs. Kirkpatrick, 14 N. J. Ch. 264.

"In determining whether a municipal corporation is subject to a particular case to estoppel restrictions, it is necessary to ascertain the scope of authority of the city agency through which the misrepresentation of facts was made and the relationship of the misrepresentation to the execution of that authority. In the instant case the city, through its council, had authority to construct bridges and improve streets; and when such improvements were made to issue warrants to the city to cover the cost thereof."

After quoting with approval from Slayton vs. Panola County, supra, the Court continued:

"In the present case the bank bought the warrants in good faith for a valuable consideration without notice of the real facts, and in reliance upon the truth of the recitals of the warrants and the several ordinances relating to their issuance. As against the bank, the city was estopped from asserting a defense based upon facts at variance with such recitals."

The above decision, approved by the Supreme Court of this State, is an explicit adoption of the doctrine of estoppel based on recitals in non-negotiable warrants. It will also be noticed the Court affirmatively treats the warrants in that

case, substantially identical in form to the warrants in this case, as being warrants and non-negotiable, but nevertheless enforces the doctrine of estoppel against the municipality.

Another Texas case is Grimes County vs. W. L. Slayton & Company, 262 S. W. 209, where the principle is asserted that where there is a total want of power by a County to issue warrants under any circumstances, the County cannot be estopped from pleading such total lack of power, but where the County under any circumstances, has power to issue warrants, and issues warrants under proceedings which are irregular, or under circumstances which are improper, but not totally ultra vires from a complete lack of any power whatever under any circumstances, the County can be estopped, if the facts justify, from questioning their validity as against a purchaser innocent of alleged defects.

In Scott County vs. Advance-Rumley Thresher Company, 288 Fed. 739, warrants were issued for road machinery without a proper appropriation having been made to pay for same as required by law. The warrants came into the hands of a purchaser who did not know of the defect. The Court pointed out that the County had the general power to attend to road matters and could at least impliedly have made a contract to purchase the road machinery provided a proper appropria-

tion had been made and the provisions of the law complied with. Even though the warrants were non-negotiable instruments, the Court held that the doctrine of estoppel applied to the county.

In Eyer & Company vs. Mercer County, 292 Fed. 292, the County gave its **non-negotiable note** for $50,000.00 in "anticipation of taxes for 1921 for County purposes", and the note provided that the proceeds thereof should be turned into the general fund of the County. The defect urged against the note was that there was an absence of power to borrow the money for which it was given or to execute the note **because there had been no previous assent to the creation of such indebtedness by the voters of the County as required by Section 157 of the Constitution of Kentucky.** The note, however, contained recitals and representations almost identical to the recitals and representations contained in the warrants in this case, to-wit:

> "Each and every act, condition and thing required to be done, to have happened and to be performed, precedent to and in the issuance of these notes, has been done, has happened and has been performed, in full and strict compliance with the Constitution and laws of the State of Kentucky, etc."

It was urged that the doctrine of estoppel

against municipalities has relation only to recitals in negotiable bonds. Replying to this contention the Court said:

> "The law as to the effect of recitals in the written obligations of municipalities has relation solely to negotiable bonds and not to such an obligation as that involved here. No authority is cited in support of this position. What is relied on is the fact that the cases in which the law has been applied have very largely been cases involving negotiable bonds. Its application in such cases, however, has not been limited to subsequent purchasers of such bonds from the original holders. It has been held applicable to the original holders thereof. In the case of Douglas County v. Bolles, 94 U. S. 104, 24 L. Ed. 46, the Supreme Court, through Mr. Justice Strong, said this:
>
> > 'And still more, the contractor for building the railroad received the bonds from the county in payment for his work, either in whole or in part, after his work had been completed. There is no pretense that he had notice of anything that should have made him doubt their validity. Why was he not a bona fide purchaser for value? The law is undoubted, that every person succeeding him in the ownership of the bonds is entitled to stand upon his rights.'

"Such being the case, what possible difference can the character of the obligation which one who loans money to a municipality receives in return therefor make as to its validity? Is not one kind of obligation just as valid as another? The ground of the estoppel is that the creditor has parted with his money or other consideration on the faith of the truth of an authorized representation as to a material fact, and, such being the case, it would be inequitable thereafter to permit the municipality to dispute its truth. And this applies whatever may be the nature of the obligation executed on behalf of the municipality.

"In the case of Citizens' Savings Bank v. City of Newburyport, 169 Fed. 766, 95 C. C. A. 232, the law as to estoppel because of a recital was applied to a note, and in the case of W. L. Slayton Co. v. Panola County, Tex. (D. C.) 283 Fed. 330, to a county warrant."

In the above case, therefore, it was emphatically held that the doctrine of estoppel applies to recitals in non-negotiable instruments as well as to recitals in negotiable instruments for the reason that the ground of the estoppel is the parting with money on the faith of the truth of an authorized representation as to a material fact, and has nothing to do with whether the representation

is contained in a negotiable or non-negotiable paper. Also it will be noted that the case of Slayton vs. Panola County, supra, is cited with approval in the above decision. And so, the County was held estopped, although the defect claimed was a very fundamental one, being a failure to comply with the requirements of the Constitution of the State that such indebtedness could not be created without previous assent of the voters of the County. Whether such assent of the voters had been obtained was held to be a fact matter, and the recitations contained in the note were held broad enough to embrace the representation that the election had been held.

In Cuddy vs. Sturtvant, 190 Pac., 909, the validity of non-negotiable municipal obligations was questioned. The obligations were sold at an unlawful discount. They bore on their face substantially the same recitals as are contained in the warrants in this case. Nothing could be added to the following language of the Court:

> "This court has announced the doctrine that the same rule or standard which measures the rights and liabilities of individuals should be applied to the business contracts of municipal or public corporations. Since it is not the negotiability that works the estoppel, but the recitals, it seems to us that the doctrine should be applied to the bonds in this case.

When it becomes a question between an innocent purchaser of bonds in the open market and the city purporting to issue them, as to which should be the loser by a breach of duty on the part of the city officers, such question should be solved in favor of the innocent purchasers.***

"This brings us to the second question, which is whether the purchasers in the open market for value and without knowledge or notice of any infirmity in the bonds were required to examine in the city records the contract made with Carstens & Earles and determine whether the bonds were sold so that a greater rate of interest would be paid than that allowed by law. The bonds, as above stated, contain a copy of the act of the Legislature which authorized their issuance, a copy of the ordinance submitting the question to the voters of the city, and a copy of the ordinance providing for the issuance and sale of the bonds. This last ordinance recites that the bonds had been sold to Carstens & Earles, and that a contract for such sale had been entered into. The bonds on their face recite that:

> 'All acts, things, elections, ordinances, resolutions, and conditions precedent to the right to issue and deliver this bond, as

prescribed by said statute and said ordinances, have happened, existed, and been performed prior to the issuance hereof.'

"This is a specific recital that every condition precent to the issuance of the bonds had been performed, and under the rule stated by Judge Dillon was sufficient to work an estoppel, and the purchasers in the open market were not required to look into the records of the city and examine the details of the contract which had been made with Carstens & Earles.

"The statute under which the bonds were issued (section 8008, Remington & Ballinger's Code) authorized the officers of the city upon the conditions there specified to issue and sell bonds. It is further provided that such bonds 'shall be sold in such manner as the corporate authorities shall deem for the best interest of the city.' Here was general authority to the officers of the city to determine whether the conditions precedent necessary to the issuance of the bonds had been performed. * * * *

"The fact that the price at which the bonds had been sold could have been discovered by examining the records of the city council will not prevent a bona fide purchaser from relying upon the doctrine of estoppel.

"In McQuillin on Municipal Corporations, Vol. 5, 2335, it is said:

> 'Recitals in municipal bonds are binding notwithstanding that they are contrary to matters appearing of public record. This is the rule in force at present'."

In First National Bank versus City of North Pleasanton, 257 S. W. (Texas) 609, the City sought to repudiate warrants which recited that they were issued for the purpose of evidencing the indebtedness of the City under and by virtue of the Constitution and laws of the State, and in pursuance of the ordinance passed by the City Council. The warrants were purchased by a bank which had no knowledge of any defect in them, and the bank had an approving opinion from a lawyer as to the validity of the warrants together with certain certificates of the city officials. It seems that in order to enable itself to issue said warrants the City had unlawfully undertaken to include in itself the territory of an adjacent town. It was held that in the face of the representations of the City it was not the duty of the buyer of the warrants to have the City surveyed or to consult the records to see if the property of others had been invaded, but that the doctrine of honesty and good faith, called estoppel, applies to a municipal corporation. The Court cites with approval

the case of Slayton versus Panola County, supra, and says, among other things:

> "It may be added in addition to that declaration that a repudiation of or failure to recognize a just debt not only is disastrous to the repudiator, but weakens or destroys the credit of every municipality in Texas. The principal as to the right of cities to issue warrants for the building of improvements is recognized in a number of Texas decisions. Lasater vs. Lopez, 110 Tex. 179, 217 S. W. 373; Stratton v. Commissioners' Court (Tex. Civ. App.) 137 S. W. 1170; Cowan v. Dupree (Tex. Civ. App.) 139 S. W. 887; Commissioners' Court v. Nichols (Tex. Civ. App.) 142 S. W. 37; Allen v. Abernethy (Tex. Civ. App.) 151 S. W. 348.
>
> "North Pleasanton was a de facto corporation at least, and as such can be and should be compelled to meet the obligations voluntarily assumed by it. No valid defense has been presented to the warrants, and honesty, justice, and truth demand the payment of debts contracted by the city. Appellant had the right to act on the presumption that the city was properly incorporated."

In Ind. Dist. vs. R. E. W. 111 Fed. 5, Judge Sanborn lays down the following doctrine:

> "It is not indispensable to the effectiveness

of an estoppel that the acts, works or deeds which work it shall be contained in a negotiable instrument or in any written contract which is the basis of the action. They are as fatal when found in instruments non-negotiable, in writings which are not the basis of the action, when they are mere spoken words, and when they are silent and deceitful acts, as they are when they are contained in a bond or note which is the subject of the action."

In Speer vs. Kearney County, 88 Fed. 749, warrants were issued by the County pursuant to irregular proceedings. The language of the Court is self-explanatory:

"It is conceded that a purchaser of these warrants does not secure the immunity from defenses accorded to the purchaser of commercial paper under the law merchant. He takes them subject to the defenses that the allowances of the debts and the issue of the warrants were not within the scope of the authority of the board, that they were without consideration, and that they were fraudulently created. In short, he takes them subject to all defenses which challenge the merits of the claims. Nevertheless, the warrants themselves are prima facie evidence that the debts are just, and that such defenses do not exist. It was within the power of this board, and it

was its duty to determine the validity of the claims on which these warrants rested, to allow or disallow them, and, if allowed, to issue warrants for their payment. The statute prescribed the time and the manner in which the board should exercise this power and discharge this duty. It did exercise the power and issue the warrants, which were regular on their face, and were apparently prima facie proof of the validity of the debts which they admitted. * * * The plaintiff, a citizen of the State of Illinois, is a holder of the warrants. The presumption is that he found them in the open market, and bought and paid for them in reliance upon the legal presumption, which certainly accompanied them, that the county board had exercised its power at a lawful time and in legal manner. * * * Moreover, in their business transactions, municipal and quasi municipal corporations are governed by the same rule that govern private individuals and corporations. Illinois Trust & Savings Bank v. City of Arkansas City, 40 U. S. App. 257, 277, 294, 22 C. C. A. 171, 182, 193, and 76 Fed. 271, 282, 293. But neither individuals nor corporations can be permitted to deny, to the damage of others, the truth of statements and representations by which they have purposely or carelessly induced such

> others to change their situation. There were lawful times and a legal way in which this board of county commissioners could have allowed these claims, and could have issued the warrants upon them. The warrants were representations of the county that they had been issued, and that the claims which they represented had been allowed at those times and in that manner. The plaintiff had the right to put his faith in these representations, and, now that he has invested his money in reliance upon them, it is too late for the county to deny them to his prejudice. A corporation which, by the regularity of the execution of evidence of its debts, which is apparent upon their face, induces lenders or borrowers to loan money upon or to buy them, is thereby estopped from denying their validity or effect on the ground that, in their execution or in the preliminary proceedings which warranted their execution, its officers failed to comply with some law or rule or action relative to the mere time or manner of their procedure with which they might have complied, but which they carelessly or negligently disregarded."

A case in which somewhat similar defenses were urged is that of Branch vs. City of Sour Lake, Texas, 9 Fed. 2d 971. The Sour Lake Case was thoroughly argued by eminent council for both

parties before the same trial judge who rendered judgment in the case at bar.

The remarks of Judge Estes holding the City estopped to plead the invalidity of the warrants are as follows:

> "(3) I am by no means sure, under the evidence here, that the defenses respecting the validity of the warrants are good. International Harvester Co. v. Searcy County, 136 Ark. 209, 206 S. W. 312; Hitchcock v. Galveston, 96 U. S. 350, 24 L. Ed. 659; City of Tyler vs. Jasper, 97 Tex. 360, 78 S. W. 1058. But regardless of that, if there were in fact irregularities, they are such that the plaintiff can, I think, successfully plead that the defendants are estopped to urge. The warrants were issued for the purpose of offering them for sale to the public, and with knowledge that they would be transferred from time to time. They were issued by a council clothed with authority to issue such instruments. Before they were sold to any one, the requisite tax to liquidate them was provided, and the record attesting their validity was made. There was no fraud or conspiracy, as in the Slayton case (D. C.) 283 F. 330, or lack of authority, as in the Watson Case, 97 F. 450, 38 C. C. A. 264. The proceeds from the sale of the warrants were received by the municipality and applied to

public use, and the plaintiff, the present owner of the warrants, bought them in good faith after reasonable investigation.

"These facts, it seems to me estop the defendants from pleading the irregularities connected with the transaction. The authorities on this point are collated, and the principles that are applied in the decisions are set forth, in the case of Scott County v. Thresher Co., cited above."

The above decision of Judge Estes was affirmed in City of Sour Lake v. Branch, 6 Fed. 2d 355 and Certiorari was denied by the Supreme Court of the United States in the same case, 46 Supt. Ct. 24, 269 U. S. 565.

It will be observed that in nearly all the foregoing cases, the doctrine of estoppel was applied against municipalities which had issued **non-negotiable** notes, warrants or bonds. Therefore, the fact that the warrants in this case are non-negotiable cannot relieve the City of Gainesville from the consequences of the representations it has made. To the same effect see:

Fernald vs. Gilman, 103 Fed. 801;
City Harris Construction Co., 212 Fed. 256;
Morgan vs. Miami County, 2 Black (U. S.) 722;
Mercer County vs. Hackett, 1 Wall 83.

In Hughes County vs. Livingston, 104 Fed. 306, bonds issued by the County contained recitals in substantially the identical language as those contained in the warrants in this case. The defects claimed were sweeping and fundamental, to-wit, that the County never received any consideration for the bonds, that they were issued to take up fictitious warrants issued without compliance with the statutes, that the County never owed a fundable debt under the statutes, that none of the proceedings required to be taken to issue funding bonds were ever taken, **that the proposition submitted to the electors relative to the issuance of the bonds was not in accordance with the terms of the statute,** that the County Commissioners did not advertise the bonds for sale before they issued them and did not register them as required by satute, and evidence was offered to prove each and everyone of the foregoing defects. The Court declined to admit the evidence on the ground that the County was estopped to assert the existence of any of said defects, and this holding of the Trial Court was affirmed by the Circuit Court of Appeals. For lack of space we quote only a comparatively small part of the powerful and decisive language of Judge Sanborn:

> "Recitals are inserted in municipal bonds for the express purpose of inducing buyers to purchase them in reliance upon the truth of

the certificates they contain. Purchasers universally do so. Then the salutary rule steps in, that one who by his acts or representations, or by his silence when he ought to speak out, induces another to change his situation in reliance upon those acts or representations or upon that silence, so that a denial of their plain meaning or effect will injure the latter, is estopped from making such a denial, and that rule forbids the inequitable defense that the recitals in such bonds were not true.**** In the case in hand the laws of South Dakota were such that there might have been a state of facts under which this country would have had the authority to issue these bonds. Under the general laws of that state, this county of Hughes had the power, before the act of 1889 was passed, to erect a court house and a jail, to incur a debt, and to issue warrants for that purpose. If it had done these things, it would have had a lawful debt, which the act of 1889 would have given it ample power to fund. Whether or not it had such a debt when these bonds were issued was a fact peculiarly within the knowledge of its officers, a fact concerning which the purchasers of its bonds would be likely to be densely ignorant. It was therefore exactly one of those facts conditioning the existence and exercise of its power that

under all the decisions it had the right, and that it was its plain purpose, to put at rest by the recitals which the legislature authorized it to insert in its bonds. Those recitals, therefore, were not futile, for the reason that the county had no power to issue the bonds, because there might have been a state of facts under which the power would have existed, and a certificate to the effect that such a state of facts did exist estops the county from denying its existence, and from defeating the bonds on the ground that the certificate was false. ***** That principle is that one may not vest in his agent the power to determine whether or not he has authority in a given case, and silently take the benefit of his decision and his act as agent, and then deny his authority, to the detriment of strangers who have innocently acted in the belief that his power was ample. It is that when a municipal body has lawful authority to issue bonds on the condition that certain facts exist or certain acts have been done, and the law intrusts the power to, and imposes the duty upon, its officers to ascertain, determine, and certify the existence of these facts at the time of issuing the bonds, their certificate will estop the municipality, as against a bona fide holder of the bonds, from proving its falsity

to defeat them. * * *

"In the consideration of these questions, our attention has been called again to the argument that the conclusion which we have now reached opens wide the door for faithful officials to issue unauthorized bonds of their municipality. The argument is that courts should require innocent purchasers to presume that the authorized recitals and certificates of public officials are false; that the debts which they declare are just obligations of their muicipalities are void; and that they should impose upon such purchasers the duty to examine the antecedent records and proceedings of these officers to ascertain whether or not these debts are valid. The argument is suicidal. If it is the duty of an innocent purchaser to presume that the lawful certificate of public officials in the face of bonds is false, and to look to the records and proceedings of those officials to ascertain whether or not it is true, by the same mark it must be equally the duty of such a purchaser to presume that the records and proceedings are also false, and that wherever they disclose no valid debt they falsely disclose that fact, and the truth is that a valid debt exists. If this presumption of falsity is to obtain, the results will be the same, and the debt will be

presumed to be valid because the records show it to be valid. The truth is that this contention is unworthy of serious consideration. The great majority of municipal officers are upright, honest, and watchful of the public welfare. The actions of honest and faithful officals must not be subjected to the suspicions which fit only those who are dishonest and faithless. Contracts cannot be made and enforced, courts cannot administer justice, business cannot be transacted upon any other presumption than that private citizens and public officials alike are innocent of wrong and faithful to their trusts until they are proved to be faithless. In the consideration of the validity of contracts of municipalities, the fact must not be overlooked that municipal officers are not the agents of the purchasers of bonds. They are the agents of the municipalities. They are selected by the creditors of the city or of the county they represent, nor by the courts, but they are chosen by the municipalities themselves. If there is danger that such officers will violate their oaths, and corruptly barter away the rights of the people whom they represent, through the abuse of rules of action which have been established for the guidance of honest men and faithful officials, the remedy is not the punishment

> of innocent creditors who have purchased the negotiable securities of municipalities upon the faith of the acts of their officers, which were generally known to and acquiesced in by their citizens. It is in the election by those citizens of honest men and faithful officials."

The Court in the foregoing case at great length held that the purchaser of the County's obligation is not required to go behind the recitations upon the face of the obligation and examine the records and proceedings of the municipality to see if any defect is there disclosed.

In Board of Commissioners vs. National Life Insurance Company, 90 Fed. 228, 231, 32 C. C. A. 591, 594, the following doctrine is announced:

> "The result is that the recital in the bonds before us that they were issued in accordance with the provisions of the statute imports that they were issued in pursuance of a lawful and proper resolution, and of honest and just action on the part of the Board of County Commissioners under that statute. It relieves the innocent purchaser of all inquiry, notice and knowledge of the actual action and record of the Board, and estops the County from denying that proper action was taken and that a lawful resolution was passed."

The same principle is announced and applied in the following cases:

City of Cairo vs. Zane, 37 U. S. 673;

Nolan County vs. State, 83 Tex. 193;

City of Tyler vs. Tyler Building & Loan Association, 99 Tex. 6.

McQuillin on Municipal Corporations, Vol. 5, Section 2335, states the rule thus:

> "Recitals in municipal bonds are binding, notwithstanding that they are contrary to matters appearing of public record. This is the rule in force at present."

Another elaborate case deserving mention is that of Dietrict vs. Bath County, 292 Fed. 279. The bonds contained recitations in form substantially identical to those contained in the warrants in this case. The defect claimed was that the bonds in part were issued to refund an indebtedness which was invalid because created in violation of the Constitution in that there was not a previous two-thirds vote authorizing its creation. The County was held estopped to assert said alleged invalidity after a very full discussion of the doctrine of estoppel.

Cases strikingly similar to the Panola County case, and in which the doctrine of estoppel was enforced, are:

City of Cadillac vs. Woonsocket Institution, 58 Fed. 935, 7 C. C. A. 574;

Kent vs. Dana, 100 Fed. 56, 40 C. C. A. 281.

We assume more than enough authority has been furnished to establish beyond doubt the application of the doctrine of estoppel to the case at bar. There is no case among those cited in which the representations and recitals were any stronger or more explicit than those in the case at bar. In many of the decisions cited such representations and recitals were decidedly weaker and less explicit. In many of the most important of the above decisions it is emphatically held that the doctrine of estoppel applies without regard to whether the obligation in which the recitals are contained be negotiable or non-negotiable. A number of the cases above cited are warrant cases, including the recent Texas case of Payne vs. Bank of Columbus, supra. Also, in many of the decisions it is distinctly held, among them being included several decision of the United States Supreme Court, that the purchaser has the right to rely upon the truth of the recitals contained in the obligation, and is not charged with knowledge of defects which he might ascertain by inspecting the records and proceedings of the municipality, and that any other rule would greatly impair, if not destroy, the marketability of such obligations and the practical ability of

municipalities to finance needed improvements by the issuance of such obligations.

Finally, we call attention to the fact that in many of the cases above cited the character of defects asserted were very vital and fundamental. In many of such decisions the defects resulted from violating or ignoring constitutional and statutory requirements and conditions precedent. In some of such decisions, it will be remembered, the defect consisted in the failure to hold an election or in the failure to properly hold an election required as a condition precedent to the issuance of the securities. Nevertheless, the just and salutory doctrine is firmly and uniformly applied that if the municipality has the general power under any circumstances to issue its obligation for a given purpose and its authorized officers represent that such circumstances in fact exist and that all necessary proceeding have been had and all conditions precedent complied with, such municipality, after the obligations have passed into the hands of a purchaser for value without knowledge of any infirmities, cannot deny the truth of the representations that have been made, and the purchaser is not charged with knowledge of any defects which might be disclosed by an examination of the records and proceedings of the municipality.

Even if the warrants be regarded as bonds, the recitals and representations in the case at bar, as in many of the cases cited, are broad enough and strong enough to amount to a representation that all conditions precedent, including the holding of an election, if that were necessary, had been fully complied with. Hence it would avail the City nothing in this case, even if the warrants were treated as bonds.

The purpose of the recitals and representations is to lead prospective purchasers to believe them and buy, and nothing could be more disastrous to the credit of cities and counties and their ability to finance public improvements, than the doctrine that a purchaser of municipal obligations cannot safely accord verity to such recitals and representations.

## ALLEGED KNOWLEDGE OF BROWN-CRUMMER INVESTMENT COMPANY

The City, however, urges that Brown-Crummer Investment Company knew of the defects existing in the warrants in this case. This claim is wholly without foundation in the evidence. As already shown, there is not the slightest evidence that any representative of Brown-Crummer Investment Company saw or knew the contents of any of the proceedings of the City Council prior to the ordinance of December 16th, 1919.

The authorities conclusively hold that Brown-Crummer Investment Company was not charged with knowledge of the contents of such prior proceedings, in view of the representations later made. Most of the miscellaneous defects claimed by the City are based upon such prior proceedings, with notice of which we are not charged. There is not the slightest evidence anywhere in the record that anyone informed any representative of Brown-Crummer Investment Company of the existence of any of said alleged defects which the City claims are disclosed by said prior proceedings.

As we recall it, the only defect claimed, which arises out of the events and proceedings subsequent to December 16th, 1919, is the failure of the contractor to finish the job. As to this defect likewise there is no evidence in the record that Brown-Crummer Investment Company, at the time of paying for any of the warrants, was aware that same were not supported by an equivalent amount of work and material. There is not a syllable of evidence suggesting that W. M. Harris, the attorney who was passing upon the validity of the warrants for Brown-Crummer Investment Company, had any such information. Neither is there a syllable of evidence anywhere in the record suggesting that Mr. Crummer, under whose supervision and authority the entire

transaction was being handled, and who was actually paying for the warrants in behalf of Brown-Crummer Investment Company, had any such information. The personal reference to Mr. Crummer appearing on page 27 of the City's brief, is wholly without any basis in the record or in actual truth.

It is true that Mr. Blaine was present in Gainesville at three or four night meetings of the City Council. It so happened the meeting of the City Council were regularly held at night, and Mr. Blaine appears to have brought to three or four of these meetings the forms of proceedings which had been prepared by Judge W. M. Harris. There is no evidence that Blaine was ever present in Gainesville during that period in question save at night at such meetings. There is no evidence that he ever saw or inspected the progress of the job at any of said night visits, or that if he had done so, he could have formed an opinion, or that he was qualified to form any opinion, as to whether the job had progressed to a point justifying any particular estimate. It does appear from the evidence that the job was progressing during the period that the estimates were issued, and that during that period all of it had been done except the laying of brick on certain streets, and the evidence further shows that for a long time much material was on the ground, which was moved away later, when the contractors were

enjoined and left the City. All of the foregoing is undisputed. Furthermore, there is not a syllable of evidence to indicate that anyone ever informed Mr. Blaine that any of the estimates were not supported by an equivalent amount of work and material.

The so-called scintilla of evidence rule prevailing in the State Courts of Texas does not prevail in the Federal Courts. In order to raise an issue of such knowledge on the part of Brown-Crummer Investment Company, the City is required to produce a substantial amount of tangible, definite evidence, having real probative value. All the evidence it has produced is that Blaine was present in three or four Council meetings at night. This, we submit, is altogether too nebulous and unreliable in probative value to meet the rule of the Federal Courts.

Excellent statements of the circumstances justifying the Trial Court to direct a verdict may be found in the following decisions:

Senter vs. W. U. Tel. Co., 16 Fed. (2 Series) p. 120 (Fifth Circuit);

United Central Oil Corporation vs. Helm, 11 Fed. (2d Series) p. 760 (5th Circuit, the Supreme Court denying certiorari, 46 Sup. Ct. Reporter, p. 638);

Hardy, etc., Co. vs. Baker, 10 Fed. (2d Series) p. 277 (6th Circuit);

Schute vs. Hildreth, 8 Fed. (2d Series) p. 128 (8th Circuit);

Barret vs. Virginian Ry. Co., 250 U. S. 473;

Snow Co. vs. Lamborn, 267 U. S. 248.

That is not all, however, Blaine was merely a salaried employee, receiving either $200.00 or $250.00 a month. The undisputed evidence if he had no authority whatever either to make or change any contract for Brown-Crummer Investment Company. He was merely a traveling solicitor. Furthermore, his employment ceased altogether about September 1, 1920, and after that he only acted as a messenger three or four times for Judge W. M. Harris to take to the Council papers which the latter had prepared and to receive some of the adjustment checks representing the second 5% discounts on the warrants, and all this he did after his employment ceased and merely as a courtesy and accomodation on account of his information about the deal. Some of the adjustment checks were made payable to Brown-Crummer Investment Company by the City, but some were made payable to Blaine, in spite of letters received by the City from Brown-Crummer Investment Company, requesting that said checks be made payable to them. Blaine merely endorsed and transmitted these checks to Brown-Crummer Investment Company, as was proper. All of the disputed estimates in this case were

allowed after Blaine's employment ceased, and during that period the contact he had with the matters involved in this case, as above explained, was merely as a courtesy and accommodation.

More important still, however, the undisputed evidence in this case is such that even if Blaine knew that the estimates were not supported by equivalent work and material, the City is estopped and cannot be heard to impute that knowledge to Brown-Crummer Investments Company. The undisputed evidence would still estop the City. It knew that Judge W. M. Harris, of Dallas, Texas, was passing on the validity of the warrants from time to time, and it further knew that Mr. Crummer, at Wichita, Kansas, the executive head of the company, was paying for the warrants from time to time. The City had letters both from Judge Harris and from Mr. Crummer, who were Blaine's superiors, advising it most emphatically and most explicitly that Brown-Crummer Investment Company contemplated and expected to accept and pay for the warrants only as and when the job progressed and estimates were allowed in due course. These letters appear at pages 262-267 of the transcript. A like letter was written for attention of H. W. Head, the man into whose possession the City escrowed said warrants in the first instance. By these letters the

City and Head were each emphatically informed of the conditions and circumstances under which Brown-Crummer Investment Company was willing for the warrants to be escrowed, and under which it understood and expected the delivery of the warrants would be handled, and under which it would would be expected to pay for them. The City, therefore, well knew what Blaine's superiors expected and understood about the matter. There is no pretense that the City informed either Judge Harris or Mr. Crummer that the matter would be handled in any other manner than that outlined in the foregoing letters. There is no pretense that Blaine ever reported either to Judge Harris or Mr. Crummer that the matter be handled in any other manner. Yet, with that knowledge, the City, from time to time, proceeded to pass the various resolutions in evidence, and the City officials signed the affidavits in evidence, and said resolutions and affidavits, as well as the warrants themselves, contained the completest recitals and representations as to the regularity of the proceedings and compliance with all legal requirements and conditions and the amount of work and material that had been done and furnished. The City in its brief says the Mayor and members of the Council did not read what they signed. This statement is utterly without evidence to support it; on the contrary, the undisputed evidence is that the Mayor and mem-

bers of the Council read all the resolutions and papers before signing them, and that they did so on the advice of the City Attorney.

Thus we see that with the most definite and emphatic knowledge of the understanding upon which Blaine's superiors, Judge Harris and Mr. Crummer, were acting, the City, from time to time made the recitals and representations which have been described, and caused Brown-Crummer Investment Company to pay out its money from time to time on the faith of said recitals and representations. There is not a syllable of evidence to suggest that either Judge Harris or Mr. Crummer was not acting in the utmost good faith. The record contains a letter written by Mr. Crummer to Judge Harris, his own lawyer, at page 262 of the transcript. In this letter Mr. Crummer is informing his own counsel confidentially of his desires and understanding as to the manner in which the delivery of the warrants should be handled. This letter is just as clear and free from suspicion as any letter written directly to the City.

In the above conduct, H. W. Head participated. The warrants were first escrowed in his possession. He himself had a letter from Mr. Crummer specifying the conditions upon which Brown-Crummer Investment Company would be willing to pay for the warrants, which letter is just as

clear as any of the letters to the City. The letter to Mr. Head is shown at page 266 of the transcript. Mr. Head therefore, had the same information as the City in regard to Brown-Crummer Investment Company's understanding, and, like the City, he had that information from much higher authority than Mr. Blaine. Nevertheless, he caused his drafts, with the documents which have been described attached thereto, to be forwarded to Brown-Crummer Investment Company, and this course of business as to each estimate was followed by the City and H. W. Head for the purpose of causing Brown-Crummer Investment Company to pay for the warrants. The undisputed evidence is that Brown-Crummer Investment Company in fact relied upon the representations and recitals contained in the warrants and documents when it paid for the warrants, and it may be fairly assumed that Judge Harris necessarily relied upon them in forwarding his approving opinions with the drafts. We submit, therefore, it would be monstrous to now permit either the City or the Head Estate to assert that the recitals and representations in question were really false, and to take advantage of their falsity.

In its brief, the City lays some stress upon the failure of Judge Harris and Mr. Blaine to testify. The City was well aware of Mr. Blaine's

presence during the trial. Blaine was no longer in the employ of Brown-Crummer Investment Company, and had not been in its employ for about five years, and Blaine, therefore, was just as available to the City as a witness as he was to Brown-Crummer Investment Company, and if the City had any reason to believe he possessed the knowledge in question, he should have been called to the stand by the City.

As to Judge Harris, he was subpoenaed as a witness some days before the trial, but did not arrive in Gainesville until after the testimony in the case had been closed.

## ESCROWING THE WARRANTS MADE THEM GOOD

Another matter should be mentioned. It will be recalled that when the warrants were escrowed by the City, and in order to protect itself against any loss should the escrow agent prematurely or improvidently deliver the warrants, the City required and procured from H. W. Head and from Southern Surety Company indemnity agreements and bonds to secure the City against loss if any of the warrants should be finally delivered without its consent. It has been held that the City may properly escrow warrants intended to pay for a job in progress of construction where it

takes a bond to secure itself against loss in the event the job should not be finished.

In Graves vs. M. Griffin & Sons, 189 S. W. 778, the warrants were actually delivered to the contractor in consideration of such a bond, and the transaction was held an treated as a proper transaction.

In the case at bar, the warrants were not even finally delivered to the contractor when the bonds were taken, but were merely escrowed, and the undisputed evidence as to the terms of the escrow is that the warrants were to be finally delivered upon estimates from time to time as the work progressed. Such an arrangement was certainly legitimate, and upon the authority above cited the warrants are valid and enforcible in the hands of Brown-Crummer Investment Company even though it were true that the job was not finished, since the City took indemnity agreements and bonds for its protection, and then undisputedly consented to the delivery of the warrants.

The above decision holds it proper for the City to deliver the warrants outright to the contractor in consideration of receiving such indemnity agreements and bonds, and it can make no difference that in this case the City first escrowed the warrants and later consented to their final delivery.

## REMOVAL OF CASE

It seems to be suggested rather than urged in the City's argument in support of its petition for writ of certiorari, that this case should have been remanded to the State Court. The litigation originally began in the State court and was removed to the Federal court by Brown-Crummer Investment Company. The trial court overruled the City's motion to remand the case. The City took no exception to such action of the trial court, and did not assign same as error. Indeed, after the case reached the Federal court, and after the City's motion to remand had been overruled, the City completely abandoned its former pleadings in the case and substituted entirely new pleadings, and upon this appeal it was stipulated between the parties as follows:

> "All parties having repleaded in this court, with the exception of Southern Construction Company, which did not appear, it is agreed that the transcript of the proceedings in the District Court, as well as all abandoned pleadings, may be omitted by the Clerk in making out the record for the Circuit Court of Appeals as immaterial." (Tr. 120.)

By the foregoing stipulation, the City expressly agreed that the former pleadings upon which the original jurisdiction of the Federal Court depended, were no longer material in the case after

the motion to remand was overruled. In effect, the City thus stipulated that the action of the trial court upon the motion to remand was correct, otherwise the former pleadings could not be immaterial. Furthermore, in the absence of such former pleadings in the record, it must be presumed that the ruling of the trial court was correct.

As a matter of fact the pleadings in this case were thrice abandoned and thrice substituted. The City's original petition was abandoned and substituted by its First Amended Original Petition. That was abandoned and completely substituted by a Second Amended Original Petition, and that in turn was abandoned and completely substituted by the City's Third Amended Original Petition, and the case was actually tried upon the last mentioned petition, which is the only one of plaintiff's petitions actually in the record.

Of course, there can be no doubt of the jurisdiction of the Federal court over the controversy presented in said last mentioned petition between the City of Gainesville, a Texas corporation, and Brown-Crummer Investment Company, a foreign corporation. The cause of action therein asserted by the City against Brown-Crummer Investment Company is in substance that the warrants in question are invalid, and having been acquired by the City with knowledge of such

invalidity, should be cancelled. To that controversy the City, which is the obligor upon such warrants, and Brown-Crummer Investment Company, which is the owner of such warrants, are the only indispensable parties. The cause of action asserted against the Head Estate in said pleading is founded upon an alleged breach of the written indemnity agreements furnished by H. O. Head and Southern Surety Company to the City. We assume no discussion is necessary to show that the controversy presented in such pleading between the City and Brown-Crummer Investment Company, is a separable controversy.

All prior pleadings of the City having been theretofore abandoned and substituted, and such prior pleadings not being set out in the record, it must certainly be presumed that the trial court acted properly in overruling the motion to remand. This legal presumption is further strengthened by the express stipulation of the City that all such prior pleadings are immaterial in this cause.

The record is wholly silent as to the contents of the City's original petition, and of the City's second amended original petition. It is also silent as to the contents of the first amended original petition, except for the following stipulation partially stating its contents, to-wit:

"And thereafter, on December 10, 1923, the

> plaintiff filed its First Amended Original Petition making Brown-Crummer Investment Company a defendant, and alleging that the warrants constituted valid, legal and binding promises and obligations of the plaintiff, and the plaintiff further pleaded, in the alternative, that if it be true that said warrants were not valid, which the plaintiff denied, and the Court should hold that such warrants are void, then the plaintiff in said pleading prayed that the warrants be cancelled and declared void." (Tr. 121.)

The record does not state whether there was any other party defendant to said First Amended Original Petition, and it does not set forth any of the remaining contents of said pleading. If the Head Estate was a party thereto, the record is silent as to the allegations against the Head estate. The record does not disclose upon which of the successive petitions above mentioned the case was removed to the Federal court. If it was removed upon the Original Petition, or upon the Second Amended Original Petition, the record is wholly silent as to the contents of such pleadings. If it was removed upon the First Amended Original Petition, the record is silent as to its contents except to the extent above stated. In any event, every presumption in favor of the trial court's ruling must be indulged.

Let us assume for the sake of argument, as is apparently assumed in the City's brief herein, that the City's pleading at the time of the removal of the case, set forth two causes of action:

(a) A cause of action against the Head estate for alleged breach of the written indemnity agreements given by the Head estate and Southern Surety Company to the City to protect the City against the delivery of the escrowed warrants before notification by the Mayor that they might be delivered and before the work done by the Construction Company equaled the required amount.

(b) A cause of action against Brown-Crummer Investment Company alleging:

> "That the warrants constituted valid, legal and binding promises and obligations of the plaintiff, and, in the alternative, that if it be true that said warrants were not valid, which the plaintiff denied, and the Court should hold that the warrants are void, then that the warrants be cancelled and declared void."

Upon such a state of pleading clearly the second cause of action presents a separable controversy between the parties thereto, if it presents any cause of action at all. Whether the allegations constitute a good or bad cause of action has nothing to do with whether the contro-

versy is separable. If the controversy is separable, Brown-Crummer Investment Company, is entitled to have the Federal Court determine whether the cause of action is good or bad.

To be sure, the Head estate asserts that the City has suffered no damages on account of the breach of said indemnity agreements because the outstanding warrants are invalid anyhow. The validity of the warrants, therefore, is a **question** arising in the course of the controversy between the City and the Head estate. Such question, however, is not determinative of the controversy between them, because there may be other reasons which would preclude the City from recovering from the Head estate. For instance, the Head estate contends, and the Trial court so held, that the conditions of said indemnity agreements had been actually complied with by H. O. Head.

Likewise, the validity of the warrants is a question arising in the course of the controversy between the City and Brown-Crummer Investment Company. Such question, however, is not determinative of that controversy either. As heretofore shown in this brief, even if the warrants were invalid, they would not be subject to cancellation in the hands of Brown-Crummer Investment Company on account of the doctrine of estoppel. The point is that the existence of a common question in the two controversies, if a

common **question** may be said to exist, does not prevent one of the controversies from being a separable controversy between the parties thereto. It may be **convenient** to join the controversies in a single suit on account of the existence of a common question among other questions, and it may even be proper to do so, but if there be no joint liability, and if one of the controversies can be wholly determined between the parties thereto without the presence of any other party in the case being indispensable, then such controversy is a separable controversy.

English vs. Supreme Conclave, 235 Fed. 630;
Bates vs. Carpentier, 98 Fed. 452;
Barney vs. Latham, 26 L. Ed. 514, 103 U. S. 206.

So, in the state of pleadings above supposed, the controversy between the City and Brown-Crummer Investment Company is clearly separable. The controversy is whether the warrants should be cancelled. The City is the only obligor on the warrants; Brown-Crummer Investment Company is the only owner of said warrants. Necessarily, they are the only indispensable parties to the determination of the controversy whether the warrants should be cancelled. It might be convenient for the City to litigate the question of the validity of the warrants, in one case combining both controversies,—but it is by

no means necessary to do so. There was nothing to prevent the City from filing an independent suit against Brown-Crummer Investment Company, asserting the invalidity of the warrants and asking for their cancellation, and in such suit it would have been wholly unnecessary to join any other party,—certainly unnecessary to join the Head estate.

No character of joint obligation or joint liability is asserted by the City against Brown-Crummer Investment Company and the Head estate. On the contrary, the cause of action asserted against Brown-Crummer Investment Company in the supposed state of pleading, is a wholly alternative cause of action. The alternative character of same further emphasizes its separability. See:

Strother vs. Union Pacific Ry Co., 220 Fed. 731;
Bedell vs. Baltimore Ohio Ry. Co., 245 Fed 795.

Respectfully submitted,

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(10)

FILED

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IN THE

# Supreme Court of the United States

No. 433

CITY OF GAINESVILLE,
Petitioner,

vs.

BROWN-CRUMMER INVESTMENT COMPANY, SOUTHERN SURETY COMPANY AND H. O. HEAD, EXECUTOR OF H. W. HEAD,
Respondents.

## Brief of Brown-Crummer Investment Company Replying to Brief for Petitioner and to Brief for H. O. Head, Executor.

Briefs have been filed recently in this cause by counsel for H. O. Head, Executor and by counsel for petitioner. The able brief filed by the Executor's counsel is largely based on adroit but erroneous interpretations of our contentions. The petitioner's brief, like its application for writ of

certiorari herein, is replete with over-heated and unfounded statements and generalizations both of fact and law. Accordingly we take the liberty to submit the following observations by way of replication to said briefs.

**The Instruments are Warrants**

As shown in our original brief, it has been definitely settled by a long line of authorities in Texas that instruments substantially identical in form to those involved here are warrants and not bonds, even though their form possesses certain characteristics of bonds. In spite of the doubt which adverse counsel profess, it is nevertheless a fact that warrants in form substantially identical to those involved here have been issued for many years in great quantities, by cities in Texas, both large and small, as well as by counties in Texas, both large and small, and there are now outstanding in the hands of innocent investors throughout the country many millions of dollars worth of such securities, including the warrants in this case, which have been bought and paid for on the faith of such decisions recognizing such instruments to be warrants instead of bonds. In the culminating decisions of Lassater vs. Lopoz, 202 S. W. 1039, 217 S. W. 377; Branch vs. Sour Lake, 6 Fed. (2nd) 655, 9 Fed. (2nd) 971; Payne vs. First National Bank of Columbus, 291 S. W.

209, and in Graves vs. O'Neal & Sons, 189 S. W. 778, the exact contention was made that is made here, to-wit, that such warrants were issued as a device to circumvent the law of Texas relating to the issuance of bonds, and in each instance the court, after mature consideration, held the instruments to be warrants.

These decisions we submit are entirely sound. If John Smith signs a promissory note in the ordinary negotiable form and delivers it to Bill Jones, such note is a negotiable instrument. If, however, before signing and delivering such note John Smith writes across the face thereof "This is a non-negotiable note" his intention is respected by the courts, and the instrument though otherwise negotiable in form, is treated as a non-negotiable instrument. The same principle applies here. The City's intention is perfectly manifest. In the original contract between and City and the Contractor, it is stipulated that the Conractor shall be paid by city warrants. In the contract of June 18th, 1920, between the City and Brown-Crummer Investment Company, it is again stipulated that the instruments are to be warrants (Tr. 206-207). In everyone of the several ordinances and resolutions passed by the City of Gainesville from time to time, it is repeatedly stipulated that the instruments to be issued shall be warrants. **In the form of the instrument itself and on the face and in the body thereof, it is**

**no less than six times denominated and characterized to be a warrant** (Tr. 245-247). The word "warrant" as applied to a municipal obligation, has long had a recognized significance in the law. It is well understood to be a non-negotiable obligation. The City's intention in this case to issue warrants could not be more clear; and there is nothing whatever in the record to suggest that such intention was not a bona fide intention. In support of the judgment of the trial court and of the Circuit Court of Appeals, it must be presumed that each of said courts believed and found such intention to be a bona fide intention. Certainly there is no reason in common sense or legal principle why such bona fide intention should not be respected.

Furthermore, if it be true that the City of Gainesville had no right to issue bonds under the facts of this case, then certainly it should not be presumed in the teeth of the repeated declarations by the City of its intention to issue warrants that it intended in fact to do something else which it had no right to do. On the contrary, even if the instruments issued may be construed as either bonds or warrants, then in the absence of clear evidence disclosing an unlawful intention, it must be presumed in favor of the official acts of the City's responsible officials that they intended to do what they had a lawful right to do

and that the instruments issued in this case were intended to be and are warrants.

### City's Power to Issue Warrants

It is not our contention, as implied by learned counsel, that the City of Gainesville may do anything and everything not forbidden by its charter. On the contrary, we rely as we shall show, upon the same doctrine stated in the case so much relied upon by them, to-wit, Foster vs. City of Waco, 113 Texas, 352, that a municipality possesses those powers which may be "necessarily or fairly implied in or incident to the powers expressly granted." Neither is it our contention that the City of Gainesville has authority to issue warrants to an **unlimited** amount. Neither is it our contention that we rely exclusively on Section 3, Article 2 of the Gainesville charter, nor that we rely exclusively on Section 1, Article 4 of said charter, nor that we rely exclusively on both of said sections together. On the contrary, we rely upon the whole charter, including the above sections and others to be mentioned, which taken together and rationally construed in the light of settled authority incontestably establishes the power of the City of Gainesville to issue the non-negotiable time warrants which were issued in this case.

It will aid in dispelling confusion to bear in

mind certain fundamental distinctions which existed in our municipal jurisprudence long before the present Gainesville charter was granted in 1909, and which have continued to exist in our municipal jurisprudence since that time.

(a) Wherever a municipality is authorized by the law of its creation, whether general statute or special charter, to make a given public improvement, such municipality has the implied power to pay for such improvement as it is thus authorized to make by the issuance of its non-negotiable obligations, such as warrants. That is the actual situation in the case at bar. There will not be implied however, from the power to make the improvement, any power to pay for same by the issuance of negotiable obligations, such as bonds. The existence and reasons for these rules and distinctions are well stated by this Honorable Court in Claiborne County vs. Brooks, 28 L. ed. 470 and in Policy Jury vs. Britton, 21 L. ed. 251. The learned counsel, however, are constantly confusing the above mentioned powers.

(b) Entirely distinct from the power of the municipality to pay for a public improvement by the issuance of its obligations is the power to **borrow money** for the purpose of building improvements. These two powers have long been recognized by the courts as being entirely differ-

ent and distinct. The first of them is implied from the power to make the improvement; the second of them however, is not ordinarily implied from the power to make the improvements. The above distinctions and the reasons for them may be found mentioned in Allen vs. LaFayette, 8 So. 30, Ashby vs. James, 226 S. W. 737 and Payne vs. Bank of Columbus, 291 S. W. 209. Yet, the learned counsel are also constantly confusing the above mentioned powers.

Thus it appears that neither the power to issue **negotiable** obligations, nor the power to **borrow money** may be implied from the power to make the improvements **but that the power to pay for the improvements by the issuance of non-negotiable obligations is implied by the courts from the power to make the improvements.** We call attention to these long settled rules of construction, because they must be carried in mind in the consideration of the authorities, and because they at once make clear the purpose, function, and effect of the several provisions of the Gainesville charter which we shall have occasion to discuss.

First, it should not be forgotten **what power** has been actually exercised in this case. As we have shown, it is not the power to issue negotiable bonds. Neither is it the power to borrow money. Yet the learned counsel are constantly assuming that these are the powers which have

been actually exercised in this case. There is no justification for such confusion. The contract between the City and the Contractor stipulates that the contractor shall receive its pay in the form of warrants to be issued and delivered to him by the City (Tr. 139-140). This contract was confirmed by ordinance (Tr. 165, 46-63). By successive resolutions from time to time, the City authorized the actual delivery of certain warrants in certain amounts to the contractor upon estimates duly audited, found to be correct and approved (Tr. 251-260, 167-173). Although as shown in our original brief, certain of the warrants were escrowed in advance, none of them were actually released from escrow for final delivery until the passage of such resolutions from time to time (Tr. 258-267, 191-193). There is not a syllable of evidence in the record from which it may be remotely inferred that the City used any of the warrants for the purpose of borrowing money with which to pave its streets. There is not a syllable of evidence in the record to suggest that the City procured the proceeds resulting from the sale of any of said warrants and then spent such proceeds to pave its streets. No part of the proceeds of the warrants ever came into the hands of the City. The undisputed evidence is that the warrants themselves were delivered to the contractor or upon the contractor's order to its nominee or assignee, and that the money paid for said war-

rants by Brown-Crummer Investment Company was paid to the contractor or to the contractor's assignee, H. O. Head. The paving was done directly by the contractor and not by the City. The actual power therefore, which the City has undertaken to exercise in this case, is the power to pay for its share of the cost of street pavement by the issuance of its non-negotiable warrants to the contractor, and not the power to borrow money for the purpose of paving its streets, or the power to issue negotiable bonds.

And so bearing in mind the power actually exercised here, we come now to the charter itself to ascertain whether such power exists.

**Sec. 3, Art. II:** The learned amicus curiae seek to depreciate the significance of Sec. 3 of Article 2 of the charter which reads as follows:

> "The City of Gainesville shall have power to enact and enforce all ordinances necessary to protect health, life and property, and to prevent and summarily abate and remove nuisances, and to preserve and enforce the good government, order and security of the city and its inhabitants, to protect lives, health and property of the inhabitants of said city, and to enact and enforce any and all ordinances upon any subject; provided, that no ordinance shall be enacted inconsistent with the laws of the State of Texas, or inconsistent

with the provisions of this act; and provided further, that the specifications of particular powers shall never be construed as a limitation upon the general powers herein granted; it being intended by this act to grant to and bestow upon the inhabitants of the City of Gainesville full power of self-government, and it shall have and exercise all powers of municipal government not prohibited to it by this charter or by some general law of the State of Texas, or by the provisions of the Constitution of the State of Texas."

The charter is an act of the legislature. This article is one of its opening provisions, and obviously lays down a rule of construction by which the whole act is to be construed. It furnishes a guide which must be followed in the interpretation of every grant of power therein contained, and is not confined merely to the powers mentioned in the article itself. It furnishes a legislative rule of construction plainly intended to apply to every power granted in the entire Act, the last explanatory clause of the article being as follows:

"***It being intended **by this act** to grant to and bestow upon the City of Gainesville **full** power of self-government, and it shall have and exercise all powers of municipal government **not prohibited to it by this charter,"** etc.

Clearly, the Legislature is attempting to furnish a guide for the interpretation and construction of the entire Act. Now, we do not assert, as suggested by the learned counsel, that the effect of this article would be to confer upon the City the power to do anything and everything not expressly forbidden by the charter. But we do assert that by this section the Legislature has commanded that every grant of power that is contained anywhere in the charter should not be construed as a limitation upon other powers in the charter, but should be construed in a liberal spirit, and that from every grant of power actually contained anywhere in the charter should be implied such incidental powers, not expressly forbidden, as are fairly appropriate to its exercise. Certainly no one can justly deny to this section the forces and significance above indicated.

The section, however, does more than merely lay down a rule of construction. It also contains some very important grants of power in itself, the last clause therein being as follows:

> "And it shall have and exercise all powers of municipal government not prohibited to it by its charter or by some general law of the State of Texas or by the provisions of the Constitution of the State of Texas."

We submit that this language in connection with the preceding language of the section is

plainly intended by the Legislature to confer upon the City of Gainesville all powers of municipal government conferred by the general laws of the State of Texas on cities. It will be borne in mind that many cities in Texas are organized and act merely under general laws; others are organized and act under special charters The above section clearly bestows on the City of Gainesville all municipal powers authorized by the general laws of the State. **In other words, the general laws of the State of Texas conferring powers on cities are in effect by this section adopted by reference and made a part of the special charter of the city.** Now, as we shall see from the authorities shortly, cities in Texas deriving their powers from the general laws of the State have abundant power to do exactly what the City of Gainesville has done in this case, that is, to issue non-negotiable time warrants to pay for the making of authorized public improvements. Thus, the section under discussion not only commands that the powers contained in the special charter shall be liberally construed, but also confers upon the city all municipal powers given to cities by the general laws of the State, which includes the power to do what was done in this case.

**Section 5, Art. II.** In Article II, Section 1, is conferred the general power to contract. In Article III, Section 1, is conferred the general power to levy taxes. And then in Article II, Section 5,

we find the following vital and fundamental powers:

> "The City of Gainesville shall have and exercise exclusive power and control over the streets, avenues, alleys, etc., **** within the city; and the council shall have power to open, abolish, widen, extend, establish, regulate, grade, pave, macademize, drain, clean or otherwise improve said streets, avenues, alleys, highways, etc."

Here is a clear, comprehensive and unqualified power to pave streets. From this section, as we shall show, must be implied the power to pay for the pavement of streets by the issuance of non-negotiable warrants. Yet the learned counsel make no reference to this important section anywhere in their argument.

In City of Galveston vs. Loonie, 54 T. 517, the plaintiff's right to a recovery depended on the power of the city of Galveston to construct sidewalks and give its valid, written, non-negotiable obligation to pay therefor at a future day. The charter empowered the City of Galveston to "construct sidewalks." The court held that the power to execute written obligations to pay for the construction of said sidewalks, specifying in what installments and at what times the indebtedness was to be paid, must be implied from the power to construct sidewalks, saying:

> "Speaking of municipal corporations, Dillon, in his work on that subject says: 'To the extent necessary to execute the special powers and functions with which it is endowed by its charter, there is an implied or incidental authority to contract obligations.' 1 Dillon, Sections 371-372***** We are of the opinion that the City of Galveston, under the charter, had power to incur indebtedness in constructing sidewalks and in making sanitary improvements, and to execute written contracts specifying in what installments and at what times that indebtedness was to be paid."

The same doctrine was approved in City of Galveston vs. Heard, 54 Tex. 420.

Thus was established in Texas, long before the Gainesville charter was granted in 1909, the familiar rule of charter construction, that where a municipality is empowered to make a particular improvement, it has the implied power to pay for same by the issuance of non-negotiable obligations.

The learned counsel admit that such might be the rule as to powers conferred upon counties, but intimate the rule may or should be different as to cities. It will be observed, however, that this doctrine was first applied in Texas to cities. And since that time the doctrine has been applied

by our courts, uniformly, both to cities and counties.

In Hoffman vs. County Commissioners, 41 P. 566, the court said, with respect to county warrants:

> "It is established doctrine that a municipality has the implied power to incur indebtedness whenever it is necessary to do so to carry out any power conferred upon it unless the contracting of such debt is prohibited by statute."

In Graves vs. O'Neill & Sons, 189 S. W. 778, the city issued warrants to pay for certain water works improvements. The Court said:

> "But the City of Tioga was authorized to make contracts for the improvement of its streets and water works and could determine that such improvements should be paid for otherwise than by the sale of bonds. If, therefore, said city determined that the improvements involved in this suit should be paid for by warrants of the city, and such warrants, and not bonds, were issued for that purpose, the statute forbidding the issuance of bonds unless authorized by a majority of the taxpaying voters of the city, has no application."

In Lasater vs. Lopez, 202 S. W. 1039, 110 T. 179, very full and well considered opinions were de-

livered both by our Court of Civil Appeals and by our Supreme Court. In the opinion of the Court of Civil Appeals will be found a historical discussion of the implied power of the county to issue its non-negotiable time warrants to pay for roads and bridges, which it is authorized to build, and it will be noticed that such implied power is now based upon a statute which merely authorizes the county court to provide roads and bridges and to audit and settle the county's accounts. The Court of Civil Appeals said:

> "The cases discussed have been followed by many others and it is well established that the Commissioners Court has the power to incur indebtedness, not only to the extent of the revenues of the county during the terms of office of such commissioners, but also to the extent of contracting away revenues which will be collected during many years, and to evidence the indebtedness by interest-bearing warrants." (Citing authorities).

The Court then proceeded to further hold that other provisions of law conferring upon the county the power to issue bonds, after vote of the people authorizing same, does not limit or abrogate the above implied power to issue warrants. The Court further said:

> "Had there been statutes forbidding the commissioners' court to issue warrants except

to the extent of the current revenues for the year, the court would perhaps have held in the Breedlove case that the power to issue bonds was necessarily implied from the provision directing the erection of courthouses. In appellants' brief the doctrine that the commissioners' court can accomplish by means of warrants what the voters have refused to permit them to accomplish by means of a bond issue is assailed in a very forceful manner. The only answer we can make is that it is a matter which should address itself to the Legislature. It may be that debts which will exhaust the revenues for years to come should only be created by bond issues, but the Legislature has not seen fit to say so, and it has had many opportunities to do so, since it has been authoritatively established that the laws did not so provide."

In the Supreme Court opinion on the same case of Lasater vs. Lopez, supra, the court first pointed out that the county had no implied power to issue negotiable securities to pay for the construction of roads and bridges. But, with reference to the implied power to issue non-negotiable warrants to pay for same, the court said:

"At the time of the passage of the Act on April 28, 1903, granting authority for their use for county road purposes, Commissioners Courts had the undoubted power, within the limits of

lawful taxation and by observance of the constitutional requirement relative to the creation of county indebtedness, to provide for the building of such roads by the issuance of interest bearing county warrants. They had possessed it since the orginal Act of 1876 providing for their organization. This authority, where it was necessary for the county to use its credit for the purpose, was but a part of the power reposed in those courts to lay out and establish the roads, and proceeded, as well, from their duty to establish them by constructing them as durably as possible within the county's resources or limits of taxation. It was a means for executing the general power expressly granted, a lawful means because appropriate to that end."

The Court then proceeds to hold that the later act of the Legislature granting authority to counties to issue negotiable county bonds for road and bridge purposes did not have the effect of abrogating the pre-existing power to pay for same by the issuance of non-negotiable warrants, and said:

"The power originally possessed was that of issuing for the purpose non-negotiable instruments. The power conferred by the later act was that of issuing for the purpose negotiable securities, and contemplating, neces-

sarily, road improvements upon a larger scale than had been or would be possible through the issuance of warrants. The two powers relate to making use of a county's credit in distinctly different ways and evidencing its debt by instruments of clearly different nature, different in their legal import and different in their legal effect upon the rights of the county under them. There could be no positive opposition in the lawful exercise of both powers."

In Bridges vs. City of Lampasas, 249 S. W. 1083, was involved the power of a city, incorporated under the general laws of the State, to issue non-negotiable warrants in payment for permanent street improvements without a vote of the people. This power was implied from the legislative delegation to cities of the power to control, create and otherwise improve streets. The language of the court dealing with the powers of cities in Texas is clear and decisive:

"Second. It is generally conceded and well established, that municipal corporations are invested by implication with the power to contract on the general credit of the city with respect to such improvements as they are authorized to make (citing numerous authorities."

"Third. It is well settled in Texas that

counties have power to contract for the construction of courthouses, or for the improvement of public roads, on the general credit of the county, and to issue in evidence of the indebtedness thereby created the interest-bearing warrants of the county, maturing in after years." (Citing numerous authorities).

"Fourth. Cities incorporated under the general laws have authority to issue interest-bearing warrants in evidence of indebtedness lawfully created." (Citing numerous authorities).

"Eighth. The authority granted by the third section of the Acts of the Thirty-seventh Legislature (Chapter 9) to any city providing for improvements to issue coupon bonds therefor in such manner as may be deemed expedient, is a mere expression of the intention of the Legislature that such cities and towns shall have authority, if they elect to do so, to issue bonds under the general law, based upon the increased taxing power provided by this statute, and will not be construed as a limitation on the existing power of such corporations to contract for public improvements on the general credit of the city, and issued in evidence of the indebtedness thus created the interest bearing non-negotiable warrants of the city, for the reason that the existence of this

> power to contract must have been known to the Legislature at the time the act in question was passed; and there is no language contained in the act which in any manner undertakes to limit or restrict the then existing powers of municipal corporations with respect to authorized public improvements."

An examination of the foregoing decision will disclose, as heretofore stated, that under the general laws of the State cities have the power to pay for pavement by either of two methods, to-wit, the issuance of non-negotiable warrants without vote of the people, or the issuance of negotiable bonds by vote of the people. Both of these powers were put into the general laws of our State relating to cities at the same time, and it will be noticed that the Court emphatically holds that the power to issue bonds by vote of the people does not limit or restrict the power to issue warrants without a vote of the people and that both methods of financing are available to cities under the general laws of the State. Finally, referring to the case of Lasater s. Lopez, supra, where the power of counties was involved, the court concludes with the following important declaration:

> "All the reasons given in that case for sustaining the power of counties to pursue the course referred to apply with equal force to cities and towns incorporated under the stat-

> ute; and therefore we agree with the Fifth Court of Civil Appeals, which held in Graves vs. M. Griffin, O'Neill & Sons, 189 S. W. 778, that such municipalities possess such power."

To the same effect, with respect to the powers of cities, see First National Bank vs. City of North Pleasanton, 257 S. W. 609.

Another very recent case is Payne vs. First National Bank, 291 S. W. 209. In that case the power of a city in Texas to issue warrants to pay for building a bridge was involved. It was contended that the real purpose of the issuance of warrants was not to pay for the bridge but to **borrow money** for the purpose of using the proceeds to build a bridge. The Court recognized the difference between the power to pay for a bridge by warrants and the power to borrow money for the purpose of building a bridge, through the issuance of warrants, and it held such difference to be immaterial in the particular case because the city, in any event, was estopped to deny the validity of its obligations. The Court held:

> "The city, by virtue of articles 854 and 857 of the Revised Civil Statutes of 1911, was expressly authorized to contruct bridges and improve streets. The authority given by these statutes includes an implied authority to make such improvements on credit and to

> issue interest-bearing warrants for the deferred payments of the price,"

citing with approval the cases of Lasater vs. Lopez, supra, and Bridges vs. Lampasas, supra.

In the recent case of Ashby vs. James, 226 S. W. 737, which the learned counsel confuse as an authority in their favor, it was held merely that counties did not have the power to **borrow money** by the issuance of warrants for the purpose of building courthouses. The distinction between **that** power and the power to pay for a courthouse by the issuance of warrants is stated by the Court as follows:

> "We think the trial court would have been justified in finding by this method the commissioners sought to borrow money on the issuance of warrants. This, as we understand, the court had no authority to do, except by issuing bonds. It probably had the power, if the court desired to erect a courthouse without entering into an agreement with a contractor, as it purchased the material, to issue warrants therefor, or warrants to pay for the necessary labor as the services are performed."

The above authority, therefore, merely emphasizes the distinctions we are trying to make here.

As shown in our original brief, the case of Foster vs. Waco, supra, is altogether immaterial.

The learned counsel contend in substance that the effect of such case is to hold Lasater vs. Lopez, supra, inapplicable to cities, and to deny to the City of Gainesville the power which it exercised in this case. This contention does not even possess a specious plausibility. Indeed, the rule of implied powers for which we contend here is reaffirmed in said case as follows:

> "However, the insistence is here made, and the majority opinion of the Court of Civil Appeals hold, that the power to create the debt and execute the notes in question is necessarily implied as resulting from the power expressly conferred to establish cemeteries. This is based upon the familiar rule that wherever a power is given by statute, everything necessary to the making effectual or requisite to attain the end is implied. Kent's Commentaries (13th ed.), Vol. 1, p. 551 (464). We recognize the rule, but it has no application here."

Thus, the rule for which we contend is expressly recognized by the Court in said case, but the Court points out that such rule has no application to that particular case. And it certainly has no application to that particular case. The explicit language existing in that particular charter affirmatively precludes any implied power to issue the obligations in question under the circumstan-

ces existing in that case. The phraseology in the Waco charter explicitly and affirmatively denies the power which the City of Waco undertook to exercise in that case. In other words, the power there sought to be implied was forbidden by the particular language of the Waco charter, which expressly states that if such power should be exercised under the circumstances existing in said case, same should be null and void and of no force and effect. Surely no power that is expressly forbidden can be implied, and that is all there is to the case of Foster vs. Waco.

It should hardly be necessary to point out that Crossman vs. Galveston, 112 Texas, 303, and Pye vs. Peterson, 45 Tex. 312, are altogether immaterial. As stated in the first of said two cases, if the ordinance in question had been enacted under express legislative sanction, it should be void for unconstitutionality. Of course, a power that is unconstitutional will not be implied.

It follows from the foregoing authorities that since the City of Gainesville had the express power to pave its streets, it had the incidentally implied power to pay for same by the issuance of non-negotiable time warrants, **and, therefore, Section 5 of Article II above quoted, of the Gainesville charter, alone is indubitably sufficient to authorize the warrants in this case.**

**Article IV, Section 1.** Certainly Section 1 of

Article IV of the Gainesville charter cannot and does not limit or derogate from the above mentioned clearly existing implied power. On the contrary, it relates to a distinct and different power, to-wit: the power to **borrow money** for various public improvements. It deals only with the power to borrow money for such purposes.

Even in the exercise of that power, we submit, the city is not limited to the issuance of bonds. It is not to be lightly presumed that the Legislature intended to confine the city to that one method of borrowing money, regardless of the amount borrowed or the purpose for which it is borrowed. Under the liberal rules of construction which must be applied to this charter, the word "may" must be given its usual and ordinary significance. And if there be any other method reasonably appropriate to the borrowing of money for such purposes, it clearly was not the intention of the legislature to deny to the City of Gainesville the use of such other methods. There is nothing in the section to indicate that the word "may" is not intended to mean may. This is true because in the same section the Legislature does not hesitate to use the word "shall", or other mandatory language, wherever it desires. Furthermore, at the outset of the charter, the Legislature has said that the specification of any particular power anywhere in said charter shall never

be construed as a limitation upon other powers therein conferred.

In any event, the section under discussion deals only with the borrowing of money, and therefore has nothing to do with what powers will be implied from the independent grant of an altogether different power, to-wit: the power to make public improvements, such as paving streets. Therefore, the section cannot, under any rule of construction, be treated as a limitation upon an altogether independent section, conferring an altogether independent power.

The learned counsel appear to assume that the power to make street improvements is derived from said Section 1 of Article IV. If this were true, much of the language of Section 5, Article II would be wholly useless and without function. The completest power to make street improvements had already been conferred in Section 5 of Article II, and from that power, as already shown, would be clearly implied the power to pay for same by non-negotiable time warrants. The purpose and function of the later Section 1 of Article IV is to supply those powers which are not to be implied from the powers already conferred in the preceding sections of the charter. In other words, the purpose of Section 1 of Article IV is to confer on the City the additional powers, not yet conferred, to borrow money for

public improvements and to issue negotiable bonds to repay such borrowed money. This construction gives to every section of the charter which has been discussed, a natural and logical function, and is in harmony with long accepted rules of charter construction. The construction urged by counsel, on the other hand, ignores these familiar rules of charter construction, violates the liberal rule of construction commanded by the Legislaure at the outset of the charter, disregards much of the actual phraseology in the sections under discussion and leaves much of said phraseology without any purpose, function or effect.

If the learned counsel were correct in their narrow and restricted interpretation, the result would be that every time the City of Gainesville desired to make or contract for the making of any kind of public improvement mentioned in Sec. 3 of Art. 2, exceeding $2500.00 in amount, or any time it desired to borrow money for any of said purposes in a sum exceeding $2500.00, it could do so only by issuing negotiable bonds, after a vote of the people authorizing same. It is not to be lightly presumed that the Legislature intended to put the City of Gainesville into such a strait-jacket. On the contrary, the charter is not rationally susceptible of such an extra-ordinary construction, and at the very outset of the charter the Legislature itself by the strongest language it could command, has declared that this

particular charter shall not be construed in any such spirit or manner.

It should be manifest, therefore, that the issuance of the warrants in this case was not an "experiment" or a "subterfuge" but was the exercise of a long established and legitimate power. In spite of the doubt which the learned counsel profess, it is nevertheless a fact that warrants in form substantially identical to those involved here have been issued by cities having charters substantially identical to the one involved here for long years in Texas, and in amounts aggregating many millions of dollars, and that there are now outstanding, in the hands of innocent investors throughout the country, many millions of dollars worth of such securities which have been bought and paid for on the faith of what has been long regarded and accepted as the settled and decided law of the State. It is, as we understand it, the well established rule of the Federal Court that municipal securities issued and bought on the faith of pre-existing decisions of the particular State holding such securities to be valid and enforceable, cannot be invalidated by a reversal of such decisions. The case of Keel vs. Pulte, 297 S. W. 241, is merely a decision, thus far, of one of our intermediate court, to-wit, the Fort Worth Court of Civil Appeals, and is now pending before the Supreme Court of our state. As explained in our original brief, there is every reason to

assume that the decision oft he Fort Worth Court of Civil Appeals will be reversed by the Supreme Court of Texas. It will have to be reversed, unless the Supreme Court of Texas is prepared to reverse the long line of decisions contained in this and our original brief, clearly establishing the validity of the warrants in question. Should the Supreme Court of Texas take such unforeseen course, which we do not anticipate, we submit that the Supreme Court of the United States should protect warrants issued before such reversal and bought on the faith of prior authority.

It is suggested that the continued exercise of the power to issue warrants would lead to the abuse thereof by the issuance of unlimited quantities of such securities and by the unwise issuance of such securities. As a matter of fact, the power is not unlimited. There are at least two fundamental limitations. First, warrants can be issued only for a lawful purpose, such as a public improvement which the municipality is actually authorized to make. Second, there are familiar constiutional and statutory limitations on the taxing power of the municipality and its debt-making power, and the issuance of warrants is necessarily confined within such boundaries. The argument of the learned counsel, however, is one which should be properly addressed to the Legislature. Indeed it is an argument that has been frequently addressed to the Legislature. It is, for instance,

a matter of common knowledge in Texas that such argument was vigorously urged upon the last Legislature. Yet the Legislature has never seen fit to put any limitations upon the power of municipalities to issue warrants, although such power, as shown, has been exercised in Texas for many long years. It occurs to us that if the settled law of the State is to be changed because of anyone's opinion as to its wisdom, such change should be made by the Legislature, and it should not be so made as to injure those who have heretofore invested in securities which they had every reason to believe were valid, on the faith of the decisions of our courts.

As a matter of fact, we would further venture the thought that it may be justly doubted whether there has been in the past, or is likely to be in the future, any more abuse or folly in the issuance of warrants by public officials than in the issuance of bonds by vote of the people. It is certainly open to argument whether public officials or voters are likely to use better judgment in such matters. If any event, the Legislature and our courts have heretofore seen fit to permit municipalities to issue non-negotiable time warrants for lawful purposes without a vote of the people and to permit them to issue negotiable bonds for such purposes by a vote of the people. The difference between the two powers has been long recognized in our law and there are many rational reasons why a

difference may be drawn between them. Evidently the Legislature, up to this time, has taken the view that there is a legitimate need and scope for each method of financing public improvements and has seen fit not to disturb the long line of decisions which have clearly established the right to use both of them.

**Estoppel**

In our original brief we showed by overwhelming authority that whether the instruments be bonds or warrants, the City is nevertheless bound by estoppel in either event. Against this position the counsel for petitioner seek to arouse the prejudice of the Court by various inflammatory charges not supported by the evidence, and they appear to assume that the mere repetition of such charges may supply the lack of evidence.

Thus we find in petitioner's brief repeated statements, in effect, that the warrants in question were not escrowed but were already issued before a "lick of work" was done. In our original brief the evidence is carefully analyzed, and it is shown beyond doubt that the warrants were escrowed to be finally delivered only upon estimates as the work progressed, and that they were in fact delivered from time to time on estimates over a period of several months and that the work was progressing during that period, so that by the time the last estimate was approved,

all of the work was finished except the laying of the brick surface on two streets. Then, after Brown-Crummer Company had paid for all of the warrants in question, the contractor was enjoined, and after offering to do equivalent work on other streets, eventually moved away the material it had on the ground and left the city. It is not conceded that at the time of any particular estimate the work theretofore done and material theretofore furnished did not justify same. It is merely conceded that the final result was that the City's share of the job lacked about $15,000.00 worth of work of being finished.

Again, we find in petitioner's brief repeated statements, in effect, that Brown-Crummer Investment Company was well aware of all of the alleged infirmities, that Mr. Crummer is an adventurer unworthy of belief, that Judge Harris is a mere scrivener of false recitals, that J. E. Blaine was an unscrupulous henchman doing their bidding in the dark of night, and that all of them were engaged in a nefarious conspiriacy to perpetrate a fraud upon the simple and confiding officials of the City of Gainesville, who of course, believed every representation they made to be true, and did not know that not a "lick of work" had been done. Indeed, by inuendo, Mr. Crumer is compared with one of J. L. Arlitt, whose name, it seemes, figures as villain in some two or three

important decisions wherein the doctorine of estoppel is nevertheless enforced.

Mr. Crummer's evidence, they say, is suspicious, because he said he was not familiar with the construction contract between the City and contractor, whereas in his letter of June 18th, 1920, to J. E. Blaine, he referred to the requirement that the job be finished in 180 days. They forget that this information is contained in the proceedings of the city council attached to some of the drafts. Also, they point to an isolated expression in his evidence to the effect that he supposed the City officials prepared a certain resolution, but they forget to give his full evidence on the same subject-matter at page 202 of the transcript, wherein he testified that Brown-Crummer Investment Company agreed to furnish the services of a competent attorney to prepare the forms of necessary legal proceedings, and that such proceedings were adopted by the City. It is upon these specious trifles that the attack on Mr. Crummer is based.

Judge Harris, they say, must have known all about every alleged infirmity, yet admittedly he was never in Gainesville, and according to the record, the earliest contact he had with the matter was about December 15th, 1919. The original and basic ordinance on the subject of these warrants was passed on December 16th, 1919. None of the infirmities claimed are disclosed or

suggested by any of the proceeding of the Council on or after that date. There is not a straw in the evidence to indicate that anyone had informed Judge Harris of any of such infirmities or that he ever saw the proceedings had by the Council before Dec. 16, 1919. To be sure, he prepared the form of resolution passed on Dec. 16, 1919, and subsequent resolutions, as was his duty, but he had a right to assume that the City's officials would not pass same until they could do so properly and truthfully, and he had a right to assume that when they did pass such resolutions, the recitations therein contained were true. There is not a straw in the record to suggest that he had the slightest intimation that any of said recitations were untrue. The evidence shows that the City officials in fact acted on the advice of their own City Attorney and believed in good faith that they were acting properly. Even the taking of supporting affidavits from the City officials is suspicious in the mind of the learned counsel for petitioner. Yet, this is a common practice. Brown-Crummer Investment Company was in the business of buying municipal securities in many States. Its authorized officers were not in Gainesville, and in the nature of things could not be located in all of the municipalities where it would have occasion to buy securities, and in the nature of things could not know, of their own knowledge, the existence

or non-existence of the necessary facts to support any given issue of securities. Therefore, it was and is only a matter of common business prudence to require supporting affidavits from public officials. Even the request made by Judge Harris for two clerical corrections in one of the ordinances of the city is a matter of great suspicion in the mind of petitioner's counsel. A sufficient answer to this should be the request itself (Tr. 210-212) and the fact that the corrections were never actually made, as shown by the resolution itself (Tr. 231-250).

As to the alleged knowledge of J. E. Blaine, our original brief contains a full analysis of the evidence on that subject. Blaine was a salaried traveling solicitor, who had no authority whatsoever either to make or change any contract, and he in fact left the employment of Brown-Crummer Investment Company on or about September 1st, 1920, before any of the warrants in question were issued. To be sure, he did have some occasional courtesy contact with the matter after his employment ceased, to the extent, (a) that he received some of the 5% checks from the City, although Brown-Crummer Investment Company had written the City to send such checks direct to them, and (b) that he carried some of the proceedings prepared by Judge Harris in Dallas to Gainesville as a messenger, and hence happened to be present in Gainesville on some two or

three nights when such meetings were regularly held. It is not shown that he inspected the job on such night visits, or that if he had done so he was qualified to determine whether at any particular time there was sufficient work and material in the job to justify a particular estimate. There is no pretense that anyone intimated to him or that he at any time intimated to any representative of Brown-Crummer Investment Company that any particular estimate was not justified by the progress of the job. It is merely presumed that he knew what this record itself does not show to be true, because he was in Gainesville at such two or three night meetings. Furthermore, even if it had been true that at the time of some particular estimate the job had not progressed to a point justifying same, and even if it be true that Blaine had the means of discovering same while in Gainesville at night, there is not a straw of evidence in the record to show that he actually discovered same or that anything was said about it by anyone, or that he ever at any time conveyed such information to Brown-Crummer Investment Company, and the undisputed record shows that at and before all of said time the City officials were in possession of direct and explicit communications from Mr. Crummer and from Judge Harris, informing them of the conditions upon which Brown-Crummer Investment Company was willing to receive and pay for the warrants. These men, as the

City officials well knew, were Blaine's superiors. With that knowledge the City officials nevertheless made the representations herein complained of. All this is fully elaborated in our original brief, and as there shown, it would be unthinkable to now permit the City of Gainesville to take advantage of the alleged falsity of the representations made by its authorized officials.

In connection with all of the foregoing matters, it will be remembered that two courts have already rejected these inflammatory suspicions, including the Trial Court, which had the first-hand opportunity to appraise the witnesses and their evidence, and the Circuit Court of Appeals, which reviewed the record. Both of said courts, according to the rules and standards prevailing in our Federal Courts, have held, and we submit held properly, that there is not in this record enough substantial evidence of probative value to require an issue to be submitted to the jury as to the alleged knowledge of Brown-Crummer Investment Company.

Respectfully submitted,

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FILED
SEP 17 1927
CHARLES ELMORE CROPLEY
CLERK

No 433.

# In the Supreme Court of the United States

OCTOBER TERM, 1927.

CITY OF GAINESVILLE, PETITIONER,

VS.

BROWN-CRUMMER INVESTMENT COMPANY, SOUTHERN SURETY COMPANY, AND H. O. HEAD, EXECUTOR OF H. W. HEAD'S WILL, RESPONDENTS.

## RESPONSE OF H. O. HEAD, EXECUTOR, TO PETITION FOR CERTIORARI.

F. C. Dillard,
Rice Maxey,
*Counsel for H. O. Head, Executor, Respondent.*

H. O. Head,
*Executor, Respondent, for Himself.*

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No 433

# In the Supreme Court of the United States

OCTOBER TERM, 1927.

CITY OF GAINESVILLE, PETITIONER,

VS.

BROWN-CRUMMER INVESTMENT COMPANY, SOUTHERN SURETY COMPANY, AND H. O. HEAD, EXECUTOR OF H. W. HEAD'S WILL, RESPONDENTS.

## RESPONSE OF H. O. HEAD, EXECUTOR, TO PETITION FOR CERTIORARI.

*To the Supreme Court of the United States:*

Respondent H. O. Head says, on page 6 of the petition for certiorari it is stated:

> "There was evidently some outside understanding not shown on the records of the city contemplating that Head should use the proceeds of the warrants in paying for the work that was to be done, and his obligation was that the city should receive the $47,000.00 of paving that he had paid for."

The extent of Head's obligation was as shown on pages 12 and 15 of the record, that he would protect the city by holding the warrants and proceeds until notified by the mayor that the work done by the construction company equaled the required amount.

On page 7 of the petition for certiorari it is stated:

> "The United States District Court instructed a verdict in favor of Head and the surety company doubtless upon the ground that the bond was unenforceable."

The charge, pages 226-227 of the record, recites as the reason for the peremptory instruction that the certificates furnished Head by the mayor showed that his obligation had been fulfilled.

This respondent concedes and believes that the petition for certiorari shows that it should be granted for several good and sufficient reasons. In the first place, we believe that ever since the decision of this court in *Barney* v. *Latham*, 103 U. S. 205, it has been the understanding of the court and attorneys throughout the United States that a case removed from a state to a federal court on the ground of a separable controversy under the Act of 1875 (which on this point is the same as the present statute) carried the whole case and not simply the separable controversy, and not until the Circuit Court of Appeals for the Fifth Circuit in this case, and in the case of *Little Six Oil Co.* v. *Noble*, 17 Fed. (2) 728, decided that only the separable controversy was removed were we aware that that construction of the statute had ever been questioned. Note that the language of both statutes is "*may remove said suit.*"

It is, therefore, of great importance to litigants throughout the United States, and especially to litigants in the Fifth Circuit, that this question be put at rest. Also see *Connell* v. *Smiley*, 156 U. S. 335; *Feibleman* v. *Edmonds*, 69 Tex. 334, 339; *Atlantic etc.* v. *Carter*, 88 Fed. 707.

In the next place there is a direct conflict between the decision in this case and the decision of the Court of Civil Appeals of Texas in the very recent case of *Pulte* v. *Keel, Mayor*, cited by petitioner, on the question of whether the instruments in question are municipal warrants, or are they bonds as they were held to be by the state court? If they are bonds, their invalidity will be, as stated in the opinion of the circuit court of appeals in this case, conceded; but if they are warrants that court holds them to be valid. Until this conflict is settled, suits in the state courts will be prosecuted and decided upon the basis that similar instruments are bonds and invalid, while identical suits in the federal courts will be disposed of on the basis that they are warrants.

In the next place there is a conflict between the decision of the Fifth Circuit Court of Appeals in this case and the decision of the Court of Civil Appeals of Texas in the Pulte case above cited on whether the City of Gainesville, under its charter, is given the power to issue long-time warrants of the kind in question.

In the next place the United States Circuit Court of Appeals for the Fifth Circuit in this case has decided an important question of law, which if not technically in

conflict with, is not in accord with applicable decisions of this court; and practically in conflict with the decisions of the highest courts in Texas; and in conflict with the decided weight of reason and authority. The question referred to is this: Where the charter of a municipal corporation authorizes the city to do a particular piece of work (paving the streets) and pay therefor by the issuance of a particular class of obligations (bonds) has the city the power to have that work done on a credit, and issue in payment therefor another and different class of obligations (long-time warrants)? The City of Gainesville is in its charter given the power to have its streets paved and pay therefor by the issuance and sale of long-time bonds after being authorized by a vote of the tax payers. It can also have such work done by paying therefor out of its current annual revenue, but it is nowhere expressly given the power to have this work done on a credit and pay therefor by its present council appropriating the revenues of future councils for a long series of years by issuing against such revenues warrants in large amounts payable each year. Respondent investment company, contends and the circuit court of appeals in this case holds, that inasmuch as the charter contains no express prohibition against doing this, and affirmatively authorizes in general terms the passage of all ordinances not prohibited by the constitution, unrestricted power in that regard does exist, while petitioner, and this respondent, contend that even if the general power of one council to thus anticipate and appropriate the revenues of future councils be con-

ceded, but which we do not concede, yet where specific provision is made for paying for particular work in a particular way that way is exclusive, even in the absence of restrictive words, and especially is this so where as in this case the charter is specific and emphatic in requiring a vote of the tax payers before even incurring the debt in the way expressly authorized—that authority to a city to incur a particular debt by a vote of the tax payers is a prohibition against incurring that particular debt in any other way. Let us see which of us is correct in the light of the authorities.

In the case of *Head & Armory* v. *Providence Ins. Co.*, 2 Cranch. 127, 169, it is said by Chief Justice Marshall:

> "He who acts by another acts for himself. He who authorizes another to make a writing for him makes it himself, but with these bodies (corporations) which have only a legal existence it is otherwise. The act of incorporation is to them an enabling act. It gives them all the power they possess. It enables them to contract, and when it prescribes to them a mode of contracting they must observe that mode or the instrument no more creates a contract than if the body had never been incorporated."

And in *City of Nashville* v. *Ray*, 19 Wall. 468, which involved the validity of certain city warrants, it is said:

> "Such governments are not created for any such purpose. Their powers are prescribed by their charters, and those charters provide the means for exercising the powers, and the creation of specific means excludes others."

In the case of *Zottman* v. *San Francisco*, 20 Calif. 96, 81 Am. Dec. 96, this question is very fully considered by Field, C. J. when on the Supreme Court of California, and we invite especial attention to what is there said, and to the authorities cited in the note to that case in the 81 Am. Dec.

We also invite attention to the reasoning of the Circuit Court of Appeals for the Eighth Circuit in the case of *City of Ft. Scott* v. *Brokerage Co.*, 117 Fed. 51; and to the reasoning of the Circuit Court of Appeals for the Ninth Circuit in the case of *City of Astoria* v. *American, etc.*, 225 Fed. 21.

It has also long been the law in Texas that where authority is given to do a particular thing by a city in a particular way that way is exclusive. This was so held in *City of Bryan* v. *Page*, 51 Tex. 532, in reference to a contract attempted to be entered into by a city with an attorney otherwise than by an ordinance. Also in *Ferguson* v. *Halsell*, 47 Tex. 423, it was so held with reference to the power of a county to sell and convey its land.

The case of *Foster* v. *City of Waco*, 113 Tex. 352, is a decision which we regard as directly in point in principle. That case involved the right of the city to issue long-time notes in the purchase of land for a cemetery. The power was denied upon the ground that the power given to incur debts in the charter by the issuance of bonds was exclusive. The court said:

> "Another rule equally well recognized applies to and controls this case, to-wit: that where a power

is granted and the method of its exercise prescribed the prescribed method excludes all others and must be followed" (citing a number of authorities). "The charter of the City of Waco expressly authorized its board of commissioners to create debts, payable other than out of current revenue, in two ways: First, under Art. 202 *et seq* of its charter by the issuance of bonds upon a vote of the people, payable out of taxes levied for the purpose, as provided for in the state constitution; and second, by the creation of a deficit in a limited amount, payable out of the current revenue for the next succeeding year. The latter provision contained in Art. 211 of the city charter in effect declares that in the event the revenues of the city for any one year should not be sufficient to meet the legitimate expenditures the board of commissioners may incur a deficit over and above the revenues to the extent of $50,000.00, and no more, the excess, if any, over that amount being absolutely null and void."

We are wholly unable to see any difference in principle between the lack of power in a city to purchase property and pay therefor with long-time notes, which must of necessity be met by future councils out of the revenues which they collect, and the purchase of property and the payment therefor by long-time warrants, which must be paid by future councils in the same way that they would have to pay long-time notes issued by their predecessors.

We do not wish to be understood as conceding that authority to a city council in its charter in general terms to pass all ordinances not prohibited by the constitution of the state, even where no particular prohibition is made, would be sufficient to authorize the council to

anticipate and appropriate the revenues of future councils and thereby preclude them for lack of funds from making improvements that would be as necessary and important at that time as the improvements desired to be made by the present council. General language of the kind referred to we believe will be found in practically every city charter throughout the country, and if given the broad interpretation contended for no need for specific grants of power in city charters would exist, but all specific provisions would consist of restrictions. However, what we are now concerned in is the gravity of the question which we think calls for a decision by this court, even though there be no technical conflict. But is there not upon this question such a conflict with both the decisions of this court and of the Supreme Court of Texas as to bring the petition within the recognized practice of this court to take charge of cases of that kind by certiorari? An express conflict should not be required.

Respectfully submitted,

F. C. Dillard,
Rice Maxey,
*Counsel for H. O. Head, Executor, Respondent.*

H. O. Head,
*Executor, Respondent, for Himself.*

FEB 21 1928
CHARLES ELMORE CROPLEY
CLERK

No. 452.

# In the Supreme Court of the United States

OCTOBER TERM, 1927.

CITY OF GAINESVILLE, PETITIONER,

vs.

BROWN-CRUMMER INVESTMENT COMPANY, SOUTHERN SURETY COMPANY AND H. O. HEAD, EXECUTOR OF H. W. HEAD'S WILL, RESPONDENTS.

## BRIEF FOR H. O. HEAD, EXECUTOR, ONE OF RESPONDENTS.

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*H. O. Head, Executor.*
H. O. Head, Executor,
For Himself.

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No. 433.

# In the Supreme Court of the United States

OCTOBER TERM, 1927.

CITY OF GAINESVILLE, PETITIONER,

VS.

BROWN-CRUMMER INVESTMENT COMPANY, SOUTHERN SURETY COMPANY AND H. O. HEAD, EXECUTOR OF H. W. HEAD'S WILL, RESPONDENTS.

## BRIEF FOR H. O. HEAD, EXECUTOR, ONE OF RESPONDENTS.

### Jurisdiction.

The City of Gainesville, a municipal corporation, sued Lester Levy and Harry D. Levy, who compose the partnership firm of the Southern Construction Company, H. W. Head, who was succeeded by H. O. Head as executor of the will of H. W. Head, deceased, and the Southern Surety Company, in the District Court of Cooke County, Texas.

The city's cause of action against the Levys was the alleged breach by them of a certain paving con-

tract between them and the city. The city's cause of action against H. O. Head, executor, was upon two instruments which H. W. Head executed, as follows:

"Sherman, Texas, September 10, 1920.

"To the City Council,

"Gainesville, Texas.

"Gentlemen:

"By virtue of an order from the Southern Construction Company, any moneys due said Southern Construction Co. from the City of Gainesville for work and materials furnished under a contract for street improvement is to be paid to me, said amounts being payable in city warrants.

"I understand it is now the purpose and intent of the City Council of Gainesville, Texas, to have issued to said Southern Construction Co., $10,000.00 in warrants, these warrants to be properly endorsed by Southern Construction Co., and delivered to me.

"In the event of any dispute, discrepancy, or other contingency arising which might in any way affect the amount of work done or materials furnished by Southern Construction Co., so as to in any way affect said $10,000.00 in warrants, I hereby agree to protect and indemnify said City of Gainesville, Texas, up to the sum of $10,000.00. None of said money will be paid or credited to Southern Construction Co. except in such amounts as may be shown to be due under signature of the Mayor of Gainesville, Texas, and when such amounts shall equal $10,000.00, then this obligation to be discharged.

"In case of suit arising out of the matter set out herein, or in case suit becomes necessary to enforce any rights secured hereby, such suit shall be filed in Cooke County, Texas.

H. W. Head."

(Rec. 12 and 132.)

"Sherman, Texas, October 4, 1920.

"To the City Council,

"Gainesville, Texas.

"Gentlemen:

"By virtue of an order from the Southern Construction Co., any moneys due said Southern Construction Co., from the City of Gainesville, Texas, for work done and materials furnished under a contract for street improvement is to be paid to me, said amounts being payable in city warrants. I understand that it is now the purpose and intent of the City of Gainesville, Texas, to have issued to said Southern Construction Co. $37,000.00 in warrants, these warrants to be properly endorsed by the said Southern Construction Co., and delivered to me.

"In the event of any dispute, discrepancy or other contingency arising which might in any way affect the amount of work done or materials furnished by Southern Construction Co., so as to in any way affect said $37,000.00 in warrants, I hereby agree to protect and indemnify said City of Gainesville, Texas, against loss of any character whatsoever up to the sum of $50,000.00. None of the said moneys will be paid to or credited to said Southern Construction Co., except as in such amounts as may be shown to be due by an estimate duly allowed and signed by the Mayor of Gainesville, Texas, and when such amounts shall equal $37,000.00, then this obligation will be discharged.

"In case of suit arising out of the matter set out herein, or in case suit becomes necessary to enforce any rights secured hereby, such suit shall be filed in Cooke County, Texas.

H. W. Head."

(Rec. 12 and 132.)

The city's cause of action against the Southern Surety Co., was upon two instruments which it executed as surety for H. W. Head. Head answered, setting up

several grounds of defense, among which was that the instruments called warrants issued by the city, mentioned in the instruments executed by H. W. Head, were issued without lawful authority and were invalid and of no value. The city replied, asserting the validity of the alleged warrants, but prayed in the alternative that if Head succeeded in establishing them to be invalid that they be cancelled, and that Brown-Crummer Investment Co., the present owner of the warrants, be made a party in order that the decree may be binding upon it. Brown-Crummer Investment Co., answered, asserting the validity of the warrants, and prayed for a decree so declaring.

Plaintiff city was alleged to be a Texas corporation and defendant Head was alleged to reside in Texas. The residence of both the Levys was alleged to be unknown to plaintiff. The Southern Surety Company was alleged to be an Iowa corporation. The Brown-Crummer Investment Co., was alleged to be a Kansas corporation.

It is stated in the record in a stipulation on page 120 that the Brown-Crummer Investment Co., filed petition to remove to the Federal Court upon the ground of a separable controversy, and that there was a motion to remand by the city which was overruled (R. 120). Lester and Harry Levy are necessary parties to any suit between the City and Brown-Crummer Investment Co., to cancel the alleged warrants, they being endorsers thereof (R. 18). There is no controversy between the City and Brown-Crummer Co., as to the validity of the alleged warrants. They both assert their

validity and there can be no controversy between them until after the alleged warrants are cancelled in a suit in which the Head estate and the Levys are parties.

AUTHORITIES.

*Wilson* v. *Oswego Township*, 151 U. S. 56.
*Torrence* v. *Shed*, 144 U. S. 527.
*Graves* v. *Corbin*, 132 U. S. 571.
*Extended note to Miller* v. *Clifford*, 5 L. R. A. (N. S.) 49.

In this litigation we have had no desire to thrust ourselves between the Brown-Crummer Investment Company and the City of Gainesville, or to become a partisan of either; but, believing that the instruments in controversy, whether bonds or warrants, are invalid—if bonds because not submitted to the vote of the qualified taxpayers, if warrants beyond the charter powers of the city—and, if invalid, affording no ground of action for any purpose, we have deemed it proper to make the defense irrespective of the defense that Mr. H. W. Head, in collecting the moneys from the Investment Company and paying them to the Southern Construction Company, acted under the direct authorization of the City. The record shows that the defense was made before the Investment Company was a party to the proceeding, indeed that because of this defense the City made it such party, praying in the alternative that if the instruments were held to be invalid they should be cancelled. The record further shows that a judgment by default was rendered against Mr. H. W. Head and promptly appealed from by him and reversed. Pending such appeal,

he died and Mr. H. O. Head as executor became a party to the suit. Since it can in no way affect the suit, we hope we may say without impropriety that the reason of the default judgment against Mr. Head was because he was called away from home to the bedside of a dying friend and overlooked filing an answer by default day.

Believing, as we have said, that the instruments in controversy are invalid, we shall state our reasons for this belief before showing that whether they are invalid or not there can be no recovery against the Head Estate.

## STATEMENT OF THE CASE.

This respondent will supplement petitioner's statement of the case by adding that the City's alleged cause of action against H. W. Head was based on two written instruments copied on pages 1 and 2 of this brief.

This respondent's amended answer consisted of a number of defenses, among which were the following:

> "IV. That the alleged warrants were invalid for various reasons, and therefore were of no value (Rec. 65).
>
> "VIII. That the City elected to take judgment against the Southern Construction Company for its damages, thereby treating the warrants as the property of the Construction Company" (Rec. 76).
>
> "IX. That said Head delivered all the warrants deposited with him and their proceeds as directed in the instruments of deposit under proper resolutions passed by the city council" (Rec. 77).

Other allegations were contained in the answer not necessary to mention, as the evidence was confined to those above indicated, and the charge of the court as to said respondent was confined to the last one (Rec. 226). The following evidence bearing upon this issue was introduced:

On April 6th, 1920, the city council passed a resolution (see Record 251-254), which related to the first warrants amounting to $3,000.00, as follows:

"A Resolution.

"Auditing and allowing estimate of the Southern Construction Company, for materials furnished and work performed in the construction of street improvements in and for the City of Gainesville, Texas.

City Hall, City of Gainesville, Texas,
April 6th, 1920.

"The city council of the City of Gainesville, Texas, met in regular session, in the city hall, in said city, on this, the 6th day of April, 1920, at which meeting the mayor, aldermen, and city secretary were present, when the following proceedings, among others, were had, to-wit:

"The mayor offered for consideration and passage a resolution providing for the allowance of estimate or claim of The Southern Construction Company, contractor, for materials furnished and work performed in the construction of certain street improvements in and for the City of Gainesville under its contract with the said Southern Construction Company, of date November 20, 1919.

"Moved by Alderman Buckingham, seconded by Alderman Bramble, that the resolution be adopted.

"Ayes: Aldermen Thomas, Beck, Bramble, Howell, Lewis, Puckett, Kendall and Buckingham.

"Nays: None.

"The resolution follows:

"Whereas, on the 20th day of November, 1919, the City of Gainesville entered into a contract with the Southern Construction Company, contractor, for the construction of certain street improvements in and for said city; and,

"Whereas, the said Southern Construction Company has furnished materials and performed labor in performance of said contract and in accordance with the plans and specifications at-

tached to said contract and made a part thereof, and for said materials and work the said Southern Construction Company has presented to this council their first estimate and claim covering the cost thereof to the city, which claim and estimate is in words and figures as follows, to-wit:

"Estimate No. 1.

To the City Council of the City of Gainesville, Texas:

Gentlemen:

"I present to you below Estimate No. 1, being claim for materials furnished and work performed under contract with the City of Gainesville, Texas, of date November 20, 1919, for partial cost of construction of street improvements provided for in said contract, to-wit:

| | |
|---|---|
| "For Gravel Base, Gutters and Excavation between Haight and Gorham Streets on Dixon Street ..... | $3,300.00 |
| "Less Ten Per Cent retained..... | 300.00 |
| | 3,000.00 |

Respectfully submitted,
Southern Construction Co.,
By Lester Levy,
Contractor.

"And, whereas, the materials so furnished and the work performed and covered by said claim has been by this council inspected and accepted by the city to be in accordance with the contract, and the plans and specifications adopted by this council and determined by this council to be well worth the price agreed to be paid therefor as reflected in said claim and statement of account; and,

"Whereas, said claim has been duly audited and found to be correct, and has been approved.

"Therefore, be it resolved by the city council of the City of Gainesville, Texas, that the claim

of the said Southern Construction Company, covering materials furnished and labor performed in the construction of said street improvements aggregating the sum of $3,000.00 be, and the same is hereby allowed.

"That in accordance with the terms and provisions of said contract, and the claim of the said Southern Construction Company presented to this council, there shall be delivered to the said Southern Construction Company, City of Gainesville Street Improvement Warrants, Series A-1, to the amount of $3,000.00, being warrants numbers one (1) to three (3) inclusive, in the denomination of one thousand ($1,000.00) dollars each, dated November 20th, 1919, bearing interest at the rate of six per cent (6%) per annum, authorized to be issued by ordinance duly passed by the city council of said city on the 16th day of December, 1919, and recorded in Book 6, at pages 583, *et seq.*, of the minutes of this council, evidencing the indebtedness due by said city to the said Southern Construction Company, their assigns or bearer.

"That the City of Gainesville has received full value and consideration for the warrants herein authorized to be delivered.

"Passed this the 6th day of April, 1920.

"Approved this the 7th day of April, 1920.

(Seal) (Signed) E. N. Blackburn,
Mayor, City of Gainesville, Texas.

Attest:
S. A. Bryan,
City Secretary, City of
Gainesville, Texas."

On September 22, 1920 (see Record 258), the city council passed another resolution identical with the one of April 6, 1920 copied above, except that it related to warrants 41 to 50 inclusive and the amount of the estimate approved was $10,000.00 (Record 258). This made $13,000.00.

On October 5, 1920, the city council passed another resolution identical with the one of April 6, 1920, copied above, except that it related to warrants 24 to 40 inclusive and the amount of the estimate approved was $17,000.00 (Record 258-259). This made $30,000.00.

On Nov. 2, 1920, the city council passed another resolution identical with the one of April 6, 1920, copied above, except that it related to warrants 14 to 23 inclusive and the amount of the estimate approved was $10,000.00 (Record 259-260). This made $40,000.-00.

On November 16, 1920, the city council passed another resolution identical with the one of April 6th, 1920, copied above, except that it related to warrants 4 to 13 inclusive and the amount of the estimate approved was $10,000.00 (Record 260). This completed the $50,000.00.

All of these resolutions bore the signature of the mayor (Record 254), and were delivered to Mr. Head and by him transmitted to Brown-Crummer Company (Record 251-260).

The Texas Court of Civil Appeals, on a previous appeal, construed the instruments executed by Head in an opinion as follows:

> "What Head agreed to do and what the surety company by its bonds bound itself he would do was to protect and indemnify appellee against loss in the event of any dispute, discrepancy or other contingency arising which might in any way affect the amount of work done or materials furnished by the construction company so as to in any way effect the warrants issued by

appellee to the construction company and by it, the construction company, endorsed and delivered to him.

"That Head was a mere trustee of the parties for the purpose of holding possession of the warrants until he was directed by appellee's mayor to deliver them to the construction company, is plain, we think. It was not alleged that he did not have the warrants in his possession or was not holding them as agreed upon, or that he had in any way violated the trust. If he was holding them as agreed upon, certainly appellee had no right to maintain this suit against him, and of course if it could not maintain it against him it could not maintain it against the surety company as his surety."

In answer to a motion of the City for a rehearing, the court said:

"If this court erred, as appellee insists it did, in holding that it appeared that Head was a mere trustee for the purpose of holding possession of the warrants, the conclusion reached that a cause of action was not stated against him nor against the surety company was nevertheless correct, we think, because it did not appear from the allegations in the petition that a dispute, discrepancy or other contingency arose which in any way affected the warrants turned over to Head. If Head held the warrants, and it was not alleged he did not hold them, and if he had not paid or credited any of same to the construction company except in such amounts as were shown by estimates duly allowed and signed by the mayor, and it was not alleged that he had, he had not breached his undertaking, and a cause of action against either him or the surety company did not exist. 254 S. W. 323."

District Judge Estes, who tried this case in the court below, construed the instruments executed by Mr.

Head as making him a custodian of the warrants to be held and disposed of as set forth therein, as had the state court. In his charge to the jury (Record 226-227) he said:

> "The evidence shows, in my opinion, that the city council had authority under its charter to execute the contract in question, and likewise to place the warrants with Mr. Head under the conditions disclosed by the evidence. It is my idea that the conditions of the obligation assumed by him have been discharged—that is, certificates over the signature of the mayor of the city, attesting that work was done by the contractor to the value of said warrants, were furnished him. In this state of affairs, I do not think judgment can properly be rendered against his estate herein. * * *
>
> "There is, therefore, no issue of fact for you to settle. You are, therefore, directed to return a verdict in the form hereto attached."

The form of the verdict referred to in the Judge's charge, and the one returned by the jury, is as follows:

> "We, the jury, find in favor of Brown-Crummer Investment Company against the plaintiff, City of Gainesville, in the sum of $13,125.40, with interest thereon at the rate of six per cent per annum from date hereof, together with all costs.
>
> "We further find in favor of H. O. Head, executor of the estate of H. W. Head, deceased, and Southern Surety Company, upon the causes of action asserted by the City of Gainesville against them" (Record 122).

The judgment rendered followed the verdict (Record 123-125).

H. W. Head's connection with the Southern Construction Company was that of a creditor, as appears from the following correspondence:

On January 5th, 1921, R. E. Crummer wrote Mr. Head in reference to the warrants which he had sent them, in which he said:

> "Just as a matter of record and in order to complete our files, we would thank you to kindly advise us of your connection with this transaction" (R. 209).

To which Mr. Head replied:

> "My connection with the transaction is simply that I have advanced the Southern Construction Company, who is doing the work, an amount of money for security for which I took an assignment of all that was to be paid to that company by the city and the citizens for the paving work done by it" (R. 201).

## ARGUMENT.

Brown-Crummer's contention is that the City of Gainesville only had power to issue *bonds* to a limited amount after being authorized by a vote of the property owners, but the city council had authority to issue long time warrants to an *unlimited* amount without being authorized by the voters. That this should not be and that the court will not so construe the charter if it can be avoided, we think all will agree. At the outset, we will remark that it does not change an instrument from a bond to a warrant to call it a warrant. We think a given instrument is one or the other as decided by the terms of the contract evidenced thereby, rather than by the name the parties seek to give it. Decisions under one charter or law have but little application to a different charter or law. Decisions under the general laws of Texas conferring powers upon the commissioner's courts of her counties in reference to providing public buildings and paying expenses of the counties, have but little, if any, application to the powers conferred by special acts upon city councils in reference to imposing debts upon cities.

We understand it to be conceded, and the Circuit Court of Appeals so holds, that if the instruments here involved are bonds, they are invalid for the numerous reasons set forth in petitioner's brief, so that the first question for decision is whether such instruments are warrants, as claimed by Brown-Crummer Company, or are they bonds, as claimed by petitioner and this re-

spondent. A warrant is clearly defined in 2 Dillon on Municipal Corporations, 5 Ed. Secs. 850 and 851, as follows:

> "Sec. 850: A warrant is the command of the council, board or official whose duty it is to pass upon the validity and determne the amount of a claim against the municipality, to the treasurer to pay money out of any funds in the city treasury which are, or may become, available for the purpose specified to a designated person whose claim therefor has been duly adjusted and allowed.
>
> "Sec. 851: Being merely devices for liquidating the amount legitimately due to the creditors of the municipality, and instruments necessary to carry on the machinery of a municipal administration, the power to issue warrants or orders on the municipal treasury, although not expressly conferred, may be implied as incidental to municipal or *quasi* municipal corporations whenever it is not prohibited or restricted by constitution, charter or statute. Being simply a means of paying a debt, it is necessarily implied that a valid debt or obligation of the corporation exists for which a warrant may be drawn. The warrant does not constitute a new debt, but is only the prescribed means for drawing money from the municipal treasury to pay an existing debt. Without express authority from the legislature a municipality cannot discount its warrants to its creditors so as to make them equivalent to cash, or issue warrants for more than the sum actually due the claimant, and as to the excess, they are void and the holder will be treated only as the equitable assignee of the valid legal claim of the payee. To give a warrant validity it is essential that it should be delivered to the person entitled thereto."

That these instruments are bonds within the meaning of the charter of the City of Gainesville, and that

the city is without power to issue long time warrants, has been twice directly decided by the Court of Civil Appeals of Texas in the recent cases of *Pulte* v. *Keel*, 297 S. W. 241, and *Childers* v. *Shepherd*, not yet reported, a copy of the opinion in which, however, we will file with the clerk of this court.

We think there can be no question but that if these instruments had been called bonds, instead of being called warrants, they would have been so treated. Note that they were issued for the purpose of raising money to pay for work to be done in future for which purpose bonds were authorized to be issued, while a warrant is an order on the treasurer to pay a debt already incurred, the amount due upon which is already fixed and determined. We think the fact that authority is expressly given in the charter to provide for debts of this kind by the issuance of bonds, and is not given to provide for them by the issuance of warrants, should be controlling in determining that these instruments are bonds and not warrants.

**Instruments Invalid Even if Warrants.**

If, however, it should be held that the instruments in question are warrants and not bonds, we now propose to demonstrate that they were issued without authority on the part of the city council and are invalid. We shall not undertake to discuss the numerous cases from the higher courts of our state cited by those endeavoring to sustain the warrants. In our opinion they are all distinguishable from the instant case, but to undertake to point out those differences would be to pro-

long this brief to great length and impose upon the time and patience of the court.

The very case of *Lasater* v. *Lopez*, 110 Tex. 179, so strongly relied upon, seems to us, when correctly read in the light of the constitution and the decisions, instead of being an authority sustaining the position of plaintiff in error, to militate against it. The thing decided in that case was this: That for years under existing statutes commissioners' courts had authority to issue long time warrants in payment of certain improvements; that a true construction of the Act of 1903, in connection with those statutes and under the constitution, showed that that act did not repeal the prior acts, and hence did not take away the power of the commissioners' court to issue such warrants. But it is important to note that before the passage of the Act of 1903 the power of the commissioners' court to issue warrants existed only by virtue of statutes giving such power, either expressly or by *necessary* implication. The thing that was decided was that the right of issuing warrants sprang from the constitution and statutes issued thereunder, and that such right was not repealed by the Act of 1903. This the court in its opinion made quite plain.

Assuming, as we have done, that the instruments attacked in the case are warrants, the question is whether under the grant of power from the legislature to the City of Gainesville the city had the authority to issue the warrants. That power, if it exists, is to be found in the charter of the city. If it is there found the warrants are valid. If it is not found there they

are invalid. Just here the investment company seems to have wandered away from the true rules which govern in determining what are the powers a city may exercise under its charter. In their brief herein the position they take is, that inasmuch as there is no express prohibition in the charter against the issuance of such warrants, the power of the city council is practically unrestrained.

We do not so understand the law. We do not understand that a city may do anything and everything which is not expressly forbidden by its charter. Take a single illustration: Although a charter may not forbid the issuance by a city of negotiable instruments we do not understand that, therefore, a city may issue such instruments. Indeed, in the very case of *Lasater* v. *Lopez*, referring to the commissioners' court, it was declared that without special authority such court could not issue negotiable securities. The court further said: "It is not a power to be implied. It does not exist unless expressly conferred by law."

We are making this illustration not to declare or intimate that the instruments involved in this suit are negotiable securities, for we are meeting plaintiff in error on his own ground and treating them as warrants and not negotiable but we are making it as an illustration to show that the investment company is wrong in its apparent contention that a city may do anything which its charter does not forbid it to do. We understand the true rule to be this: That before it can do aught the right to do that thing must find warrant in the charter. It must be either expressly granted or

*necessarily* implied from powers which are granted, or indispensable to the exercise of those powers. A charter of a city is not an instrument restricting the powers the city would otherwise have, but it is an instrument granting to it, either expressly or by necessary implication, all the powers which it has. It is not a restricting, but is an enabling instrument. We take this to be well settled law. We shall not cite numerous decisions, as we could easily do, to sustain this statement, but shall content ourselves with a quotation from the case of *Foster* v. *City of Waco*, 113 Tex. 352, to which we shall make reference further on. There it is said:

> "It is a general and undisputed proposition of law that *a municipal corporation possesses and can exercise the following powers and no others*: First, those granted in *express words;* second, those *necessarily or fairly implied* in or *incident* to the powers expressly granted; third, those *essential* to the accomplishment of the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied. Of every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act, or make any contract, or incur any liability, not authorized thereby, or by some legislative act applicable thereto. All acts beyond the scope of the powers granted are void. 1 Dillon on Municipal Corporations (5th Ed.), Sec. 237; 28 Cyc. p. 1533; 19 R. C. L., Sec. 75; *City of Brenham* v. *Brenham Water Co.*, 67 Tex. 542, 553, 4 S. W. 143; *The Citizens Bank* v. *The City of Terrell*, 78 Tex. 456, 14 S. W. 1003."

We think that whether an act may be done by a municipality under its charter may be expressed in these five words: "to doubt is to deny." We believe this to be undisputed law, except as it is disputed by counsels' brief herein.

With the rule established for determining the powers of the governing board of a city, as it is established by the quotation we have made from the Foster case, we come now to determine whether under its charter the City of Gainesville had the power to issue its long time warrants for the purposes for which they were issued—whether or not under the charter those warrants are valid or invalid. To establish the validity of the warrants counsel rely upon Section 3 of Art. II of the charter. Such reliance, to our minds, evidences the weakness of their position. Let us analyze that section and see what is its true construction. For convenience in this analysis the section is here copied as follows:

> "Powers of Ordinance—The City of Gainesville shall have power to enact and enforce all ordinances necessary to protect health, life and property, and to prevent and summarily abate and remove nuisances, and to preserve and enforce the good government, order and security of the city and its inhabitants, to protect lives, health and property of the inhabitants of said city, and to enact and enforce any and all ordinances upon any subject; provided, that no ordinance shall be enacted inconsistent with the laws of the State of Texas, or inconsistent with the provisions of this act; and provided further, that the specifications of particular powers shall never be construed as a limitation upon the general powers herein granted; it being intended by this act to grant to and bestow

upon the inhabitants of the City of Gainesville full power of self-government, and it shall have and exercise all powers of municipal government not prohibited to it by this charter or by some general law of the State of Texas, or by the provisions of the Constitution of the State of Texas" (Rec. 229).

In the first part of the section, down to the first word "provided" the charter is declaring the general powers of the city. What are the general powers marked out in the section? They are to protect life, to prevent, abate and remove nuisances, to preserve and enforce the good government, order and security of the etiy and its inhabitants, to protect lives, health and property of the inhabitants of the city, and to enact and enforce all laws upon the subject. But it is intended to be more specific, more particular, as to a number of things coming under these general powers. Therefore, and in order that the specification of these things may not be held to exclude the enactment of ordinances under the general powers set forth in the section the further provision is made that the specification of particular powers shall never be construed as a limitation upon the general powers *herein* granted. Having made this reservation, the charter in subsequent sections of this article proceeds to confer upon the city particular powers, all of which are embraced within the general powers declared in the section, but under the reservation that the conferring of these particular powers is not to prevent the passage of other ordinances if embraced within the general powers granted in the section. But the section proceeds: "it being in-

tended by this act to grant to and bestow upon the inhabitants of the City of Gainesville full power of self-government, and it shall have and exercise all powers of municipal government not prohibited to it by this charter or by some general law of the State of Texas, or by the provisions of the Constitution of the State of Texas." This does not broaden or increase the powers of the city. This clause is a part of the same paragraph providing that the specifications of particular powers shall never be construed as a limitation upon the general powers *herein* granted. The power to act must still be found in the charter. It must arise either by express declaration or by necessary implication from that which is declared. The grant is that it may exercise all powers of municipal government not prohibited by this charter or by some general law of the State of Texas or by the provisions of the Constitution of the State of Texas; but the powers of municipal government are, to repeat, only those warranted by the charter. To hold that the words of this section mean more than this would be to confer upon a municipality unheard of powers—to attribute to the legislature granting the charter a certain degree of mental aberration. In fact, render useless all specific *grants of powers* in municipal charters. The prohibition to do certain things does not arise because the charter does not use the words "thou shalt not" but arises as well from what it is declared may be done. To give a simple illustration:

In Sec. 7 of Art. II it is provided that the city may require a street railway to keep in repair bridges from curb to curb, and in section 9 it is provided that

the city may cause a street railway to pave the part of the street occupied by it, and then it is declared that the portion of the street so occupied shall be deemed to be the space between the tracks and twelve inches on the outside of its rails. Now, while there is nothing in the charter declaring that the city might not pass an ordinance commanding a street railway to keep its bridges in repair, not only from curb to curb, but for a foot on each side of said curb, while there is nothing in the charter saying that the city may not pass an ordinance commanding a street railway to pave three feet on each side of its tracks, yet these declarations which are made in Sections 7 and 9 operate a probition on the city so that it can not make requirements of the street railway in these particulars other than are allowed by these sections. Thus we see that the provisions of this section by no means have the very broad meaning for which counsel contend.

The position we have taken, we think, is sustained by our own authorities. For instance, in the early case of *Pye* v. *Peterson*, 45 Tex. 312, it was held that a clause in the charter of the City of Navasota which gave the power to "ordain and establish such acts, laws, regulations, and ordinances not inconsistent with the constitution or laws of this state, as shall be needful for the government, interests, welfare, and good order of said body politic" did not confer power to prescribe fire limits, the court in the opinion using this language:

> "We are of opinion that the general grant of power to establish ordinances needful for the welfare of the city did not authorize the passage of such ordinances as the one in question.

> "Municipal corporations can exercise those powers only 'which are expressly or impliedly conferred, subject to such regulations or restrictions as are annexed to the grant' (Cooley on Const. 192).
>
> "'The general disposition of the courts of this country has been to confine municipalities within the limits that a strict construction of the grants of powers in their charters will assign to them; thus applying substantially the same rule that is applied to charters of private corporations. The reasonable presumption is, that the state has granted, in clear and unmistakable terms, all it has designed to grant.'"

If this case has ever been called in question we are not aware of it. On the contrary, we find that it was specifically followed in the case of *Crossman* v. *Galveston*, 112 Tex. 303. The powers there granted the city were very broad, as appears at page 308 of the opinion; but notwithstanding their breadth, it was decided by the court that they did not authorize the enactment of an ordinance declaring a building which had become dilapidated a nuisance and providing for its removal.

The same views entertained by the courts of Texas with reference to the powers of municipal corporations prevail in the Supreme Court of the United States and if not in all, then surely in practically all, of the appellate courts of the states of the union. This general doctrine as to corporate powers is set forth in the case of *Head & Amory* v. *Providence Ins. Co.*, 2 Cranch. 127, p. 168, where Chief Justice Marshall uses this language:

> "An individual has an original capacity to contract and bind himself in such manner as he pleases * * *; but with these bodies (corporations) which have only a legal existence it is otherwise. The act of incorporation is to them an enabling act. It gives them all the power they possess. It enables them to contract, and when it prescribes to them a mode of contracting they must observe that mode or the instruments no more create a contract than if the body had never been incorporated."

See also *City of Nashville* v. *Ray*, 19 Wall. 468; *City of Ft. Scott* v. *Brokerage Co.*, 117 Fed. 51; *City of Bryan* v. *Page*, 51 Tex. 532; *Ferguson* v. *Halsell*, 47 Tex. 421; *Foster* v. *City of Waco*, 113 Tex. 352; *Parks* v. *West*, 102 Tex. 11, 16, where it is said: "It is a rule for the construction of constitutions constantly applied, that where a power is expressly given and the means by which, or the manner in which, it is to be exercised is prescribed, such means or manner is exclusive of all others" (6 Am. & Eng. Ency. Law, 928, and cases cited). *Crabb* v. *Celeste Independent School District*, 105 Tex. 194, 198, where it is said: "It is an accepted rule of construction that where a power is expressly given by the constitution (charter of a city) and the mode of its exercise is prescribed, such mode is exclusive of all others" (*Parks* v. *West*, 102 Tex. 11).

We think, then, it can not be doubted that the section relied upon by counsel does not confer upon the city the power to issue long time warrants.

Having seen that Sec. 3 of Art. H has to do with only the passage of ordinances relating to the general and particular powers set forth in that article, we must

look elsewhere in the charter to find the right of the city to pave the streets and make payment for such pavement. This brings us to Art. IV, making specific provisions for such pavement and the means of paying for it. We copy from that article as follows:

> "Sec. 1. The city council of the City of Gainesville shall have power and authority by ordinance duly passed if it so elects to borrow money on the credit of the city for permanent improvements, for public buildings, for the improvement of its streets, avenues, alleys, public grounds, building of sidewalks, macadamizing, remacadamizing, paving and repaving of streets, alleys, avenues and public grounds and for the purpose of providing the city with funds for the ownership of public utilities, including water, light, sewer and gas works; and the council may issue bonds for the City of Gainesville for all or any of the above purposes to any amount not exceeding $150,000 in any one year; provided, that in addition the said city is expressly authorized to issue bonds for the purpose of refunding the bonds of the city previously issued; provided, that the bonds be refunded at the same or a lower rate of interest than the bonds proposed to be retired draw. It is further provided that debt shall never be created by the City of Gainesville unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and create a sinking fund of at least two per cent thereon.
>
> "No bonds shall be issued for any purpose except for the purposes above named which shall not exceed $150,000 for any one year and for the purpose of refunding bonds previously issued.
>
> "No bonds shall be issued for any purpose in excess of $2500 unless an election be ordered by the mayor and city council, and if at said election the majority of the votes polled shall be in favor of creating such debt it shall be lawful for the city

> council to make the issuance of the bonds as proposed in the ordinance submitting the same at the election so held, but if a majority of the votes polled shall be against the creation of such debt it shall be unlawful for the city council to issue the bonds."

The article authorizes the paving of the streets, authorizes the borrowing of money to pay for such pavement and provides that the council may issue bonds for such purposes. It is on these two words "borrowing" and "may" that counsel seem to hang their hopes of sustaining the warrants in this case, but, in our judgment, an analysis of Article IV destroyed such hope. The article authorizes the council, if it so elects, to borrow money on the credit of the city for permanent improvements, for paving streets, and for the several other purposes named, and then provides that the council may issue bonds for (of) the City of Gainesville for all or any of the above purposes, to an amount not exceeding $150,000 in any year. What are the purposes above named? Not simply the borrowing of money, but the various things named in the article. Had the charter intended that the bonds should be issued only when money was borrowed, then it would have provided in appropriate words that the council might issue bonds for the money thus borrowed. This, however, it did not do, but provided that they might issue bonds for all or *any* of the above purposes. Therefore, if a contract was entered into for paving streets or other permanent improvement the bonds might be issued to the contractor in payment of the amount owing by the city under the contract. It is evident that the power to

issue bonds is not confined only to the borrowing of money. Nor does the use of the word "may" render the hope of counsel any rosier. It will not be denied that paving the streets is a permanent improvement and embraced within the terms of this article, and the issuing of bonds or warrants in payment therefor a public purpose. Without citing other authorities we find the law thus stated by our Texas Supreme Court:

> "Whether the word 'may' in a statute is permissible or obligatory depends in a great measure upon the true intent and object of the Legislature in making the enactment. It means 'must' whenever third persons or the public have an interest in having the act done or have a claim *de jure* that the powers shall be exercised." *Rains* v. *Herring*, 68 Tex. 468, p. 472.

In *Smalley* v. *Paine*, 102 Tex. 304 at p. 305, it is said:

> "The rule in the construction of statutes is universally established in the courts of common law that the word 'may' means 'must' 'whenever third persons or the public have an interest in having the act done or have a claim *de jure* that the power be exercised.' The rule has been recognized in other decisions of this court."

Quoting from the case of *Rock Island, etc.* v. *U. S.* 4 Wall. 435, the court say:

> "The conclusion to be deduced from the authorities where power is given to public officers in the language of the act before us, or in equivalent language, whenever the public interest or individual rights call for its exercise the language used, though permissive in form, is in fact peremptory."

What, then, is the true construction of Art. IV? It is this: That when the City of Gainesville has determined to do one of the things provided for in the article and incur an indebtedness therefor, running over a long time, it can not, to evidence such indebtedness, execute merely warrants ordered by its council, but it *must*, not it *may*, provide for the payment of such indebtedness by bonds duly authorized by a vote of the people in the manner provided by the charter. Under well established rules of law, as we understand them, in this way, and in this way only, can a long time indebtedness be incurred by the city for the purpose of paving or other public improvement. These same principles, we understand, are the foundation of the decision in the case of *Foster* v. *City of Waco*, above cited, which we shall now more specifically notice to show how apposite it is to the instant case. The basis upon which counsel endeavor to place that decision is entirely too narrow. The true basis is that which we have outlined above: That in order for a city to incur an indebtedness the power to incur it must be given either by express declaration or by necessary implication, that when the method by which it may be incurred is provided by the charter that method is exclusive.

The charter of the City of Waco in Art. 201 provides:

> "The commissioners shall have power to control and manage the finances of the city, to prescribe its fiscal year and fiscal arrangement, *to make all contracts in the management of the city's affairs and provide for the payment of its debts and expenses;* provided that it shall not make

and contract for a public service for a longer period than ten years" (italics ours).

Here is given specific power to the city to make all contracts in the management of its affairs and to provide for the payment of its debts. There is not by anything here affirmatively declared placed a restriction upon the method by which these debts shall be evidenced. If we look to this article alone there is no affirmative inhibition against the execution of the notes condemned. This article, under the construction given by counsel to Sec. 3 of Art. II of the Gainesville charter, would have authorized the execution of notes, just as much as Sec. 3, Art. II authorized the execution of warrants in the instant case. But the court looked to Art. 211 and found that under that article the city could incur debts in a limited amount on account of a deficit. It then looked to Art. 202, and there found this provision:

> "It shall have power to issue bonds upon the city for the purpose of making permanent improvements or for any other public purpose in such sums and such amounts as may be necessary or expedient; provided that said bonds shall have been first authorized by a majority vote cast by the duly qualified taxpaying voters, as shown by the last preceding tax rolls of the city voting at an election held for that purpose."
> (The remainder of the article need not be quoted.)

Now before we notice what further the court say, note that Art. 202 does not forbid the issuing of notes, does not declare that the city may not issue long time warrants, does not declare that to evidence the indebtedness the city shall issue bonds, but only declares

that the city shall have *power* to issue bonds. The words "shall have power" used in this article have no stronger meaning than the word "may" used in Sec. 1 of Art. IV of the Gainesville charter. We have seen that the true construction of that word as there used is "must." So here the true construction of the words "shall have power" is that they are equivalent to the word "shall" and this is shown by the decision itself. The court declare:

> "Since the charter of the city especially provided that it may incur debts by means of bonds and the deficit provided for in Art. 211, and since the purchase of cemeteries is plainly within the purview of both provisions, it follows under the rule announced that these methods are *exclusive*, and since the notes and contracts were not executed in substantial compliance with either *they are void.*"

At p. 55 of their brief counsel for the Investment Company say:

> "It might also be added in passing that the notes issued were negotiable notes, and it is a well settled rule of charter construction that the power to issue negotiable notes will not be implied, and that familiar rule of construction would, alone, have been sufficient to take care of the Waco case."

But unfortunately for the contention of the Investment Company, and granting to the full, if need be, that a city can not without express authorization issue its negotiable securities, the court does not place its decision on this ground, but does place it on the grounds that the method provided by the charter for

the incurring of the indebtedness is exclusive, and that no power will be implied unless the implication is indispensable to the carrying out of the expressed powers. The court say:

> "It is apparent that authority to execute and issue long time notes is not indispensable under the charter of the City of Waco to the exercise of the power to purchase cemeteries" (p. 355).

And further:

> "A municipal power will be implied only when without its exercise the express duty or authority would be rendered nugatory."

Counsel for the Investment Company criticise the decision of the court of civil appeals in the case of *Pulte* v. *Keel* and say the court rendering it made an unconscious departure from the well settled law of this state. So far from this being true, we think there is no such departure and that the court were fully aware of what they were doing, and based their well considered opinion upon the law of this state and upon sound principles announced by this Honorable Court. The opinion is not hard to understand. Reduced to its simplest terms it is this: The instruments in controversy have all the characteristics of bonds, including negotiability; but under its charter the City of Gainesville has the power to issue only bonds to secure long time indebtedness for the purposes intended, and these instruments having been issued without compliance with the charter prerequisites for the issuance of valid bonds are therefore void.

Counsel in construing the instruments in controversy say in substance it was the intention of the coun-

cil of the City of Gainesville to issue warrants, and therefore those instruments are warrants. If the city had power to issue either warrants or bonds for the purposes for which these instruments were issued, then if the instruments are ambiguous the intention of the city might be of force in construing them, but surely no one would have the temerity to hold that if the city had no power to issue long time warrants for public improvements then the intention of the city would render the instruments valid, whether you call them warrants or anything else. While speaking of this question of intention it may not be amiss to say that in our opinion it never could have been the intention of the Legislature in granting the City of Gainesville its charter and in providing for the issuance of bonds authorized by a vote of the taxpayers to secure a long time indebtedness, to practically nullify this provision by permitting the council to disregard it and issue warrants to secure such indebtedness. Can it be contended that when the charter in making provision for long time bonds provided that they should be issued only by a vote of the people, at the same time intended that the city council should be unlimited in the amount of long time warrant indebtedness it would be authorized to incur without any vote? We do not believe that anyone after reading the charter of the City of Gainesville can for a moment hesitate in deciding that the leading purpose and intention of the Legislature was to guard the city against being overwhelmed with debt incurred by the city council without a vote of the people. We think it can not be doubted that in grant-

ing the charter the Legislature did not for a moment entertain the idea of turning the city over, as to the amount of indebtedness to be imposed upon it by the uncontrolled discretion of the city council. Under the insistence of counsel the city council of Gainesville, unless prohibited by express declaration, can issue long time interest bearing warrants sufficient in amount to consume all possible revenue the city can hope to collect for a long series of years, thereby foreclosing all ability of future councils to provide for public improvements, no matter how important they prove to be. We respectfully insist that the intention of the Legislature that the municipalities of this state should be limited and not unlimited in the amount of indebtedness they saddle upon the people of the state and that the people themselves should be given the right to vote when it is proposed to incur large indebtedness is of vastly more importance than the intention of the city council. In fact, the disposition of city councils to go the limit in incurring debts when unrestrained is exactly what the Legislature intended to prevent when granting the charter to the City of Gainesville.

There can be no doubt but that a decision by this court sustaining the validity of these warrants will practically annul all provisions in the charters of the cities and towns in this state which seek to require a vote of the people upon bond issues, because if the council can issue the same kind of securities without being authorized by a vote it would be foolish to go to the trouble and expense of holding an election.

## Judgment in Favor of Head Estate and Southern Surety Company.

Regardless of the result of the decision as between petitioner, the City of Gainesville, and the Brown-Crummer Investment Company, we believe that there can be no question but that the Court of Civil Appeals of Texas and the trial judge in this case correctly construed the obligation assumed by H. W. Head and the Surety Company, and the judgment in their favor must be affirmed. The instruments signed by Mr. Head are copied on pages 1 and 2 of this brief. The important clause in those instruments is in these words: "*None of said moneys, proceeds of the warrants, will be paid or credited to Southern Construction Company except in such amounts as may be shown to be due under signature of mayor of Gainesville, Texas, and when such amounts shall equal* $10,000.00 (*in one case and* $37,000.00 *in the other*), *then this obligation to be discharged.*"

The city construed said instruments as making Head the surety of the Construction Company for the performance of the work, and based this suit upon that theory, and there is no pleading upon which a recovery could be had against Head upon any other theory, while Head construed the instruments as constituting him the custodian or stakeholder of the warrants, and that by the very terms of the instruments his obligation to the city with reference to the warrants and their proceeds was discharged when he received the stipulated notice from the mayor, and after receipt of such notice his obligation was to the Southern Construction Company. And both the Court of Civil Appeals of Texas and

Judge Estes adopted this view, and we think that in this they were manifestly correct. If the city thought there were any facts which called upon Head to withhold from the Construction Company the proceeds of the warrants after he received the stipulated notice from the mayor and council, it should have alleged and proved them. The burden was upon it to do this. We therefore confidently ask that the judgment in favor of H. O. Head, executor, and the Southern Surety Company, be affirmed regardless of the disposition of the case between the city and Brown-Crummer Investment Company. We understand this to be the approved practice in the federal courts.

See *National Surety Co.* v. *U. S.*, 228 Fed. 517; *Chiarello Bros.* v. *Pederson*, 242 Fed. 488; *Albright* v. *McTighe*, 49 Fed. 872.

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